SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 986

HILAND DAIRY, INC., REISS DAIRY, INC., and SUNNY HILL FARMS DAIRY COMPANY, INC., et als.,
Petitioners,

v.

THE KROGER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on October 31, 1968.

OPINIONS BELOW.

The District Court sustained defendant's motion to dismiss on August 28, 1967 (R. 25) and filed a memorandum opinion. 274 F. Supp. 966 (D. C. Mo. 1967) (App. A). The Court of Appeals for the Eighth Circuit affirmed on October 31, 1968 (R. Proc. U. S. C. A., p. 17), and filed an opinion. 402 F. 2d 968 (8 Cir.; 1968) (App. B).

JURISDICTION.

The judgment of the Court of Appeals was entered on October 31, 1968 (R. Proc. U. S. C. A., p. 17). The jurisdiction of this Court rests on 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Whether a claim on which relief can be granted under Section 2 of the Sherman Act is stated by allegations that a powerful national food chain is intentionally acquiring the power to exclude competitors and control prices in the dairy industry in the St. Louis trade territory in order to use the retail pricing of dairy products as a manipulative tool in food chain merchandising, and that plaintiff independent dairies are thereby threatened with destruction not by bona fide competition but by competitively-irrelevant economic power.

STATUTES INVOLVED.

Section 2 of the Sherman Act (26 Stat. 209; 69 Stat. 282; 15 U. S. C., Section 2) provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 16 of the Clayton Act (38 Stat. 737; 15 U. S. C., Section 26) provides that:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in

any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

STATEMENT.

The complaint prayed for an injunction to prevent defendant from entering into the dairy processing business in the St. Louis trade territory. The defendant did not answer but moved successfully for dismissal (R. 24-25). Therefore, the whole factual case is in the allegations of the complaint.

Petitioners, suing for themselves and all other dairy processors similarly situated, are three local independent dairies doing business within the trade territory of St. Louis, defined as being within 250 miles thereof (R. 2). Respondent Kroger is a food chain operating 1500 stores in 30 states with annual net sales in excess of $2.6 billion (R. 3). Kroger owns and operates more than 200 retail

food stores within the St. Louis trade territory from which it makes approximately 8 per cent of all retail sales of dairy products in the territory (R. 3). The Kroger stores are located in Missouri, Iowa, Illinois, Kentucky, Tennessee, and Arkansas and the processing and distribution of dairy products and sale of them in these stores would be in interstate commerce (R. 3).

Kroger sells many kinds of food products and can and does use dairy products as "leaders" or "loss leaders," making no profit or taking a loss on them in order to attract customers into its stores (R. 5). It compensates for lack of satisfactory profits on dairy products by increasing its profit margins on other food products and increasing the volume of total sales (R. 5). Kroger's power to sell dairy products at low prices in order to increase sales and profits on other market basket items is limited only by the prices at which independent dairies are willing to sell to it and by regulatory pricing legislation based on resale markups and wholesale purchase prices (R. 4-5). It can escape these limitations by operating its own dairy processing plant (R. 5).

About February 15, 1967, Kroger began construction near St. Louis of a dairy processing plant with sufficient capacity to supply more than 20 per cent of the total demand for dairy products in the St. Louis trade territory, intending to serve its own needs for 8 per cent of the retail market and to sell the balance at wholesale (R. 4-5). No more dairy processing capacity was needed in order to supply foreseeable demands in the St. Louis trade territory (R. 4-5).

Kroger's control over 8 per cent of the retail sales, its ability and practice of loss leadering, and its dual role as dairy processor and food chain, when the dairy plant is in operation, will give Kroger the power to control prices and exclude competition in dairy products in the St. Louis

trade territory (R. 6). Kroger is proceeding to build, with specific intent to monopolize, a dairy processing plant in the St. Louis area for the purpose of acquiring such power. In acting to take away customers from independent dairies, Kroger will not need to rely upon the competitive value of its dairy products, but because of its power as an integrated dairy processor-food chain can hold down the wholesale and retail prices of dairy products indefinitely to the immediate destruction of all local independent dairies, or force independent dairies to accept a price differential so favorable to Kroger dairy products that independent dairies will be destroyed gradually by loss of customers (R. 7). The fast or slow destruction of independent dairies will be achieved not by Kroger's superior bona fide competition in dairy processing, but by Kroger's use of its power as an integrated dairy processor-food chain to shut off competition on the merits in dairy processing (R. 7).

The effects will be that local independent dairies will be driven out of business or forced to specialize on a few products; the large food chains will have complete power to manipulate dairy products for the benefit of chain food store merchandising, including the power to subsequently raise dairy prices to unreasonably high levels; and the consuming public will be denied home delivery service, and other services that only independent dairies offer (R. 7). The public will be denied the protection of competition in the dairy industry because dairy processing will become a manipulative tool of the large food chains in their efforts to get greater control over the food industry (R. 7).

This action was filed February 23, 1967, in the United States District Court for the Eastern District of Missouri, Eastern Division, Regan, J. (R. 23). Jurisdiction was based on the federal antitrust laws. Injunctive relief under Section 16 of the Clayton Act (15 U. S. C., Section 26) was asked against the threat of injury resulting from the

defendant's attempt to monopolize in violation of Section 2 of the Sherman Act (15 U. S. C., Section 2) (R. 1).

On March 20, 1967, defendant moved for dismissal for failure to state a claim on which relief could be granted (R. 10, 24). On August 28, 1967, the trial court filed its memorandum opinion and order sustaining the motion to dismiss (R. 14, 25). Assuming compliance with the rule that on a motion to dismiss well-pleaded facts are admitted, the trial court held that:

> (a) Internal expansion can never violate the antitrust laws even though it is done, with specific intent, for the purpose of prevailing in the market place by placing competitively-irrelevant obstacles before competitors instead of placing competitively superior products before customers (App. A, pp. A-4–A-5).
>
> (b) Purposeful acquisition of power to place such competitively-irrelevant obstacles before competitors can never violate Section 2 of the Sherman Act unless the power acquired is dominant-percentage-type "monopoly" power (App. A, pp. A-3–A-4); and
>
> (c) Building a dairy processing plant for the purpose of acquiring the power to control prices and exclude competitors by non-competitive means, with specific intent to monopolize, is not an attempt to monopolize because any injury to plaintiffs will result only from future actions of the defendant (App. A, p. A-6).

The Court of Appeals for the Eighth Circuit affirmed on October 31, 1968 (App. B, p. A-8). It held dismissal to be appropriate even though this is a complex antitrust matter involving motive and intent (App. B, pp. A-13–A-14). It refused to accept as fact the allegation that Kroger could offset loss leadering on dairy products by raising its profit margins on other products, preferring to believe this impossible on the basis of its own knowledge of "general

competition in the market place" (App. B, p. A-18). In addition, the Court of Appeals held the complaint insufficient on the grounds that:

(a) The Sherman Act does not protect the plaintiffs' "market shares from competition of an internal expansion of Kroger into the St. Louis, Mo., Trade Territory" (App. B, p. A-15);

(b) The dangerous probability of monopolization requisite for attempt is not present because the pleadings do not allege that Kroger will ever achieve dominant-percentage-type "monopoly" power either in dairy products or retail groceries (App. B, pp. A-16–A-18);

(c) In the absence of dominant-percentage-type "monopoly" power, an allegation of specific intent is a mere conclusion of law or speculation about future intentions unless coupled with alleged acts that "even if lawful, have an unreasonable restraint on trade and unduly hinder the free flow of competition" (App. B, pp. A-19–A-22).

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals is in conflict with applicable decisions of this Court and with decisions of other Courts of Appeal, and thwarts the basic antitrust purpose of preventing increasing concentration which is achieved by predatory use of economic power, whatever form that power takes.

I. Conflict With Applicable Decisions.

(A) Internal Expansion Is Not Immune From Antitrust Liability.

Plaintiffs alleged that in this particular instance under these particular circumstances Kroger's entry into dairy

processing by internal expansion is for the purpose of monopolizing (R. 4-6). The Court of Appeals said that internal expansion can never be anything but lawful competition (App. B, p. A-15). This is in conflict with the rule laid down in Standard Oil Company v. United States, 221 U. S. 1 (1911), and United States v. American Tobacco Company, 221 U. S. 106 (1911), that the sweep of the Sherman Act is measured by the purpose for which the acts are done, not in terms of particular kinds of acts or practices. If the purpose, inherent or as shown by surrounding circumstances, is to benefit from restriction of competition instead of from public response to the value of the competitive offering, the act or practice unreasonably restrains trade and falls within the reach of the Sherman Act. 221 U. S. 1, 58. If the unreasonable restraint is accomplished by contract, combination, or conspiracy, Section 1 applies; if by any other means, Section 2 applies. 221 U. S. 1, 62; 221 U. S. 106, 179. The rule that the purpose of an act determines Sherman Act liability, never departed from, has been recently reiterated. Klor's v. Broadway-Hale Stores, 211 U. S. 207, 211 (1959).

This Court, in merger cases, has suggested internal expansion as the legally preferable way to increase market share. Philadelphia National Bank v. United States, 374 U. S. 321, 370 (1963). But this can not be read as a rule that internal expansion can never be in violation of the antitrust laws even if done for the purpose of restricting competition rather than for the purpose of competing in good faith. It is alleged, and must be accepted as fact for present purposes, that Kroger is building a dairy processing plant for the purpose of restricting competition in dairy processing. The holding below is in conflict with the above line of cases, establishing the rule and with United States v. Aluminum Company of America, 148 F. 2d 416 (2 Cir., 1945), in which building additional plant capacity for the purpose of excluding competition was held to violate Section 2 of the Sherman Act.

(B) **Dominant-Percentage-Type "Monopoly" Power Is Not a Requisite to Violation of Section 2 of the Sherman Act.**

Plaintiffs alleged that Kroger is intentionally acquiring the power to exclude competitors and control prices in the dairy industry in the St. Louis trade territory to further its retail food merchandising and that it will acquire such power by owning and operating the dairy processing plant it is building, which has capacity to supply 20 per cent of demand for dairy products in the trade territory, having already the tremendous economic power of a large national food chain, and having control of 8 per cent of retail sales of dairy products in the trade territory (R. 9-11). The Court of Appeals said that on these facts Kroger could not possibly monopolize in violation of Section 2 of the Sherman Act because 20 per cent of a market would be insufficient to achieve a "monopoly," citing the cases which sought to break up the massive stranglehold of one firm on a whole industry, such as United States v. Aluminum Company of America, 148 F. 2d 416 (2 Cir., 1945) (App. B, pp. A-16–A-18).

The holding below is in conflict with decisions of this Court which cumulatively hold that: Gaining a significant advantage over competitors by competitively-irrelevant economic power is a violation of Section 1 of the Sherman Act if done by contract, combination, or conspiracy, and a violation of Section 2 of the Sherman Act if done or attempted with specific intent by any other means. Klor's v. Broadway-Hale Stores, Inc., 359 U. S. 207 (1959), exemplifies this rule as completely as any single decided case. Klor's alleged that Broadway-Hale, a household appliance chain store, had violated Sections 1 and 2 of the Sherman Act by using its economic power to deny plaintiff its rightful competitive position because Broadway-Hale bought from appliance suppliers only

on condition that they not sell to Klor's, or at least not on equal terms. *Ibid.*, 255 F. 2d 214, 219-220, n. 13 (9 Cir., 1958). Great numbers of other brands of comparable quality appliances were available to Klor's and to consumers through other sellers. Defendants clearly did not have monopoly power over appliances in San Francisco, or even in the 11-block local area in which Klor's and a Broadway-Hale store were located. Indeed, the finding of the trial court and the Court of Appeals was that there was no restraint whatever on competition in general. The only restraint was upon the ability to compete of one competitor, Klor's. This Court accepted that finding but held that where the restraint takes effect on only one competitor the Sherman Act is nevertheless violated if the restraint results not from competitive factors but from a restrictive factor, and it held the group boycott organized by Klor's to be such a restrictive factor. 359 U. S. 207, 210.

Necessarily, the only power requisite to the violation in **Klor's** was the power to introduce the restrictive factor into the market. This Court made no distinction between the amount of power requisite to a violation of Section 1 and the amount requisite to a violation of Section 2 of the Sherman Act. It reaffirmed the position stated in the 1911 **Standard Oil** case that Section 2 completes and perfects the Sherman Act by prohibiting all attempts to reach the end prohibited by the first section, unreasonable restraints of trade, by any means other than those enumerated in the first section, 359 U. S. at 211. The **Klor's** Court then said:

> "The effect of both sections, the [1911 **Standard Oil**] Court said, was to adopt the common-law proscription of all 'contracts **or acts** which it was considered had a monopolistic tendency . . .' and which interfered with the 'natural flow' of an appreciable amount of interstate commerce" (emphasis added) 359 U. S. at 211.

It makes no difference what form the competitively-irrelevant economic power takes. In Northern Pacific Railway Co. v. United States, 356 U. S. 1 (1958), this Court definitively rejected the view that "monopoly" power or "dominance" over the tying product is requisite to finding a violation of the Sherman Act by restraining trade in the tied product. In language apposite to the present case, this Court said:

> ". . . the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not" 356 U. S. at 11.

This Court has said that the "irrevelant and alien factor" which is intruded into the choice between competing products in violation of the basic antitrust policy of preserving free competition can consist of reciprocity. F. T. C. v. Consolidated Foods, 380 U. S. 592, 594 (1965), citing **Northern Pacific**, *supra*, 356 U. S. at 3, 6, 12, and an earlier tying case, International Salt Co. v. United States, 332 U. S. 392, 396-397 (1947). In F. T. C. v. Procter & Gamble this Court said that the competitively-irrelevant power used to gain an unlawful advantage over competitors can consist of grossly disproportionate power in advertising and promotional activities. 332 U. S. 568 (1967). **Consolidated Foods** and **Procter & Gamble** were merger cases tried under Section 7 of the Clayton Act, but the rule that gaining a significant advantage over competitors by competitively-irrelevant power invalidates a merger had already been laid down in a Sherman Act case, United States v. First Nat. Bank & Trust Co. of Lexington, 376 U. S. 665 (1964). In the **Lexington Bank** case Justice Douglas' opinion for the Court summarizes individually the four "railroad cases" that were brushed aside by the majority in United States

v. Columbia Steel Co., 334 U. S. 495 (1948), and then makes clear that the use of economic power to buy market position instead of winning it by superior competitive performance violates basic antitrust policy, embodied in the Sherman Act, even though the market percentage gained is only "significant" rather than "dominant" or "monopoly" power. 376 U. S. at 673. The test is the same whether a merger is challenged under the Clayton Act or the Sherman Act. United States v. Third National Bank in Nashville, 390 U. S. 171, 181 (1968).

In Associated Press v. United States, 326 U. S. 1 (1945), an injunction was asked for violation of Sections 1 and 2 of the Sherman Act on the ground that AP by-laws prohibited sale of news services to non-members and gave members power to block competitors from membership. There was no finding that AP restricted the opportunity of any other persons or associations to cover and report news events, and other news services existed, including United Press and International News Service. The finding was that AP was the best and a newspaper that could not buy its news services was at a competitive disadvantage. This Court held that the AP by-laws were in violation of the Sherman Act, and the fact that AP had not achieved a monopoly in news services was held to be "wholly irrelevant." 326 U. S. at 13.

The Department of Justice apparently agrees that the rule of the above cases is that gaining significant advantage over competitors by competitively-irrelevant economic power is a violation of Section 1 of the Sherman Act if done by contract, combination, or conspiracy, and a violation of Section 2 if done or attempted by any other means. It has brought an action against General Tire & Rubber Co., and three subsidiary companies charging that using their total purchasing power to coerce and persuade suppliers to buy products from them and en-

tering into reciprocal arrangements with suppliers constitutes a violation of Section 1 of the Sherman Act and also an unlawful attempt to monopolize under Section 2. United States v. General Tire & Rubber Co., C-67-155, D. C. N. D. Ohio, filed March 2, 1967. Commerce Clearing House, Case No. 1929, p. 52,643.

The holding below that "monopoly" power is requisite to a violation of Section 2 of the Sherman Act, is also in conflict with the holding of the Court of Appeals for the Seventh Circuit in United States v. New York Great A. & P. Tea Co., 173 F. 2d 79 (7 Cir.; 1949). The Seventh Circuit Court of Appeals said of the A. & P. Company:

> "It used its large buying power to coerce suppliers to sell to it at a lower price than to its competitors on the threat that it would place such suppliers on its private blacklist if they did not conform, or that A&P would go into the manufacturing business in competition with the recalcitrant suppliers." 173 F. 2d at 82. "With the concessions on the buying level acquired by the predatory application of its massed purchasing power, A&P was enabled to pressure its competitors on the selling level even to the extent of selling below cost and making up the loss in areas where competitive conditions were more favorable. The inevitable consequence of this whole business pattern is to create a chain reaction of ever-increasing selling volume and ever-increasing requirements and hence purchasing power for A&P, and for its competitors **hardships not produced by competitive forces**, and, conceivably, ultimate extension. Under all the cases, this is a result which Sections 1 and 2 of the Sherman Act were designed to circumvent" (emphasis added) 173 F. 2d at 88.

(C) Present Restraint Is Not Requisite to Unlawful Attempt to Monopolize.

Plaintiffs alleged that upon completion of the dairy processing plant, together with other aspects of its strategic power, Kroger would acquire the power to exercise a significant and competitively-irrelevant advantage over its competitors in dairy processing, that it was building the plant for that purpose, and that it was proceeding with the construction with the specific intent to monopolize (R. 6-7). The Court of Appeals said that in the absence of market "dominance" or "monopoly" an allegation of specific intent is a mere conclusion of law unless accompanied by allegation of acts, which "even if lawful" are exercising a present unreasonable restraint on trade or are unduly hindering the free flow of competition (App. B, pp. A-19—A-22). This is an unsatisfactory attempt to explain the cases, discussed just above, which hold that monopoly is not requisite to a Sherman Act Section 2 violation (See App. B, pp. A-19—A-20). The holding below is in conflict with the holding of this Court that there need be no actual restraint even in monopolizing, because it is a violation to consciously acquire the power to unreasonably restrain trade. American Tobacco Co. v. United States, 328 U. S. 781 (1946). The holding below is also in conflict with the decision of this Court in Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464 (1962). In **Poller**, CBS had cancelled one UHF TV franchise and purchased another UHF TV station, resulting in the bankruptcy of the company whose CBS UHF franchise was canceled. The only fact to support the allegation that these acts, innocent in themselves, were done pursuant to a conspiracy to discredit UHF television in favor of VHF television was that CBS was a heavy investor in VHF television. These allegations were sufficient for this Court to hold that summary judgment should not have been granted, saying:

> "We believe that summary proceedings should be used sparingly in complex antitrust litigation where motive and intent play leading roles." 368 U. S. at 473.

In the instant case the allegations of control of 8% of retail dairy product sales, the practice of loss leadering, the avoidance of restraints on that practice that would come with operation of its own dairy plant, and the building of a plant with capacity to process 20% of dairy products in the trade territory, support the allegation of specific intent at least as well as the acts alleged in **Poller** supported the allegation of conspiracy. Furthermore, **Poller** was on summary judgment, and the instant case is on dismissal.

II. Thwarting Basic Antitrust Purpose.

Unless the antitrust laws protect local independent dairies against the unfair advantage that large food chains achieve through competitively-irrelevant economic power, local independent dairies will soon be as extinct as the dodo. From 1948 to January 1965 the number of producer-dealer milk processing plants in the United States declined from 11,319 to 1,677.[1] Producer-dealers are dairy farmers who have integrated into processing and distribution of milk from their own herds.[2] From 1948 to 1965 the number of processor-distributor milk processing plants in the United States declined from 8,392 to 3,920.[3] Processor-distributors buy their milk from others. Ninety-four per cent of the processor-distributors in 1965 were local proprietary firms (local independent dairies) most of whom operated only a single

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[1] Technical Study No. 3, National Commission on Food Marketing, p. 64, App. C, p. A-31.

[2] *Ibid.*, p. 61, App. C, p. A-29.

[3] *Ibid.*, p. 64, App. C, p. A-31.

processing plant.[4] By 1968, in the 74 federal milk marketing order areas, which account for 70 per cent of all milk sales, producer-dealer plants had dropped to 417, and processor-distributor plants to 1,637 owned by 1,412 firms.[5]

Kroger is the second largest food chain in the United States (App. B, p. A-9). In 1965 Kroger had already become one of nine national milk processor-distributors.[6] In the past two years Kroger has built new, extremely large, processing plants in Michigan and in the St. Louis trade territory. The Michigan plant has a capacity of 600,000 quarts a day.[7] The St. Louis plant, which was completed in the summer of 1968, has a capacity of 500,000 quarts a day.[8] In 1961-62, the last year for which figures were available to the National Commission on Food Marketing, 68.4 per cent of milk processing plants had a capacity of less than 4,000 quarts a day; 21.4 per cent had a capacity of 4,000 to 20,000 quarts a day; 5.1 per cent had a capacity of 20,000 to 40,000 quarts a day; and 5.1 per cent had a capacity of over 40,000 quarts a day.[9]

The total demand for milk is inelastic and almost static. Per capita consumption is declining at a rate that almost entirely offsets population increase.[10] Therefore, the milk that Kroger sells from its new plants will displace milk from other dairies. If we assume, on the basis

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[4] *Ibid.*, p. 61, App. C, p. A-29.

[5] Letters of Dairy Division, USDA to L. C. Paulson, May 15, 1968 and May 20, 1968, App. D, pp. A-36, A-37; "Sources of Milk," USDA C & MS-50 (1968), p. 3, App. E, p. A-39.

[6] Technical Study No. 3, p. 62, App. C, p. A-30.

[7] Dairy and Ice Cream Field, p. 60, August, 1968, App. F, p. A-40.

[8] St. Louis Post-Dispatch, Sept. 20, 1968, p. 7, App. G, p. A-41.

[9] Technical Study No. 3, p. 65, App. C, p. A-32.

[10] *Ibid.*, pp. 9-13, App. C, pp. A-24–A-28.

of the plant capacity figures just above, that 20,000 quarts a day is average capacity for a local independent dairy, Kroger's new plants with their 1.1 million-quart capacity can put 55 local independent dairies out of business completely. Twenty-five of these will be in the St. Louis trade territory. That threat was the basis of this suit. The completion of the St. Louis plant will require amendment of pleadings on retrial, but does not moot the issues involved. The threat of extinction is all the more imminent for local independent dairies now that the Kroger plant is in operation, and the question is even more urgent whether the antitrust laws of the United States apply to the acquisition of such tremendous power for the very purpose of eliminating local independent dairies by competitively-irrelevant power instead of bona fide competition.

The National Commission on Food Marketing found in 1966 that "loss leadering" or "price specialing," as it is also called, is a widely used device of food store merchandising, and that in order to benefit overall sales food chains can and do sell the featured items, such as dairy products, below cost.[11] The large food chains have been able to more than compensate for losses on loss leaders or price specials and even push their overall prices and profits above those of smaller food retailers. From 1955 to 1964 the gross profit margins of large food chains increased from 18.1 per cent to 22.8 per cent, while gross profit margins of small chains and medium chains rose very little and were less than 19 per cent and 20 per cent respectively in 1964; and increased promotional costs pushed costs and prices of chains above those of small retailers.[12] This supports plaintiffs' allegation, which the

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[11] Technical Study No. 7, pp. 175-177, App. H, pp. A-43–A-45.

[12] FTC Economic Report on Milk and Bread Prices, pp. 12-13 (1966), App. I, pp. A-47–A-48.

Court of Appeals erroneously refused to accept as fact, that large chains can profit from loss leadering dairy products by increasing their overall prices and profit margins (App. B, p. A-18).

Milk processing and distribution is a low-profit business. Profits average less than 2 per cent of sales.[13] At 50¢ for a half gallon of milk, the profit is 1¢. It is clear, therefore, that a prolonged price reduction of only a few cents can face dairies with imminent disaster. As noted above, Kroger's St. Louis processing plant was put into operation in the summer of 1968. Kroger is pricing half gallons of Kroger milk as much as 7¢ below national independent dairy milk, and as much as 10¢ below local independent dairy milk.[14] This presents St. Louis local independent dairies with the choice between slow or fast death. If, in their prices to other stores and home delivery routes, they try to meet Kroger prices the result will be immediate insolvency. If they continue to charge enough to make a profit or break even, the result will be a steady loss of customers, curtailment of home delivery and other services. The large food chains will have dictatorial power over dairy processing and distribution. If the large food chains decide to offer only full gallons of milk in glass jugs, in order to compete with each other more efficiently in loss leadering milk, anyone who can not get to the super market and carry home a 10-pound jug of milk will not be able to drink milk. Alternative channels of distribution, alternative services, alternative ranges of dairy products, will be gone when independent dairies are gone.

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[13] Technical Study No. 3, pp. 202-204, App. C, pp. A-33–A-35.

[14] Affidavit of Gray L. Dorsey, App. J, p. A-49.

CONCLUSION.

The ruling below results from a failure to follow applicable decisions of this Court, is in conflict with decisions of other Courts of Appeal, and would leave the antitrust laws of the United States powerless to prevent the acquisition by large chain stores of dictatorial control over the dairy industry by the predatory use of economic power. This petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Memorandum Opinion and Order.

(Filed in E. S. District Court August 23, 1963.)

This action is for injunctive relief from loss or damages allegedly threatened by violation of Section 2 of the Clayton Act, as further Act, 15 U. S. C. § 13. Before us is defendant's motion to dismiss the complaint, essentially for failure to state a claim upon which relief can be granted.

Plaintiffs are [illegible] on behalf of themselves and all other dairy processors allegedly similarly situated and doing business at wholesale and retail in what is referred to in the complaint as the St. Louis, Missouri, Trade Territory, a geographical area within 200 miles from St. Louis included in the alleged [illegible] are such well-known names as National Dairy Products (Sealtest Products), Foremost Dairies, Inc., Borden Company, Pet Milk Co., Inc., and Southern Milk Products.

Defendant (Kroger), the second largest food retailer in the country, is the operator of a chain of retail grocery stores, of which more than 200 are in the St. Louis, Missouri, Trade Territory. From these stores Kroger sells approximately 8 per cent of the processed fluid milk and other dairy products which are sold at retail in that territory. Presumably, the dairy products sold by Kroger are purchased from one or more of the other dairy processors [illegible] by plaintiffs.

[illegible] plaintiffs allege that Kroger has begun the construction of a dairy processing plant with sufficient capacity to [illegible] and control the total current requirements [illegible] dairy products in the St. Louis Metropolitan Trade Territory. With the specific intent of [illegible]

APPENDIX

APPENDIX A.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

Memorandum Opinion and Order.

(Filed in U. S. District Court August 28, 1967.)

This action is for injunctive relief from loss or damages allegedly threatened by violation of Section 2 of the Sherman Antitrust Act, 15 U. S. C., § 2. Before us is defendant's motion to dismiss the complaint, essentially for failure to state a claim upon which relief can be granted.

Plaintiffs are three dairy processors, who sue on behalf of themselves and all other dairy processors allegedly "similarly situated" and doing business at wholesale and retail in what is referred to in the complaint as the St. Louis, Missouri, Trade Territory, a geographical area within 250 miles from St. Louis. Included in the alleged class are such well-known names as National Dairy Products (Sealtest Products), Foremost Dairies, Inc., Borden Company, Beatrice Foods, Inc., and Sanitary Milk Producers.

Defendant (Kroger), the second largest food retailer in the country, is the operator of a chain of retail grocery stores, of which more than 200 are in the St. Louis, Missouri, Trade Territory. From these stores Kroger sells approximately 8 per cent of the processed fluid milk and other dairy products which are sold at retail in that territory. Presumably, the dairy products sold by Kroger are purchased from one or more of the 67 other dairy processors claimed to be represented by plaintiffs.

The complaint alleges that Kroger has begun the construction of a dairy processing plant with sufficient capacity to supply more than 20 per cent of the total current consumer demand for dairy products in the St. Louis, Missouri, Trade Territory, "with the specific intent of supply-

ing the full needs of all defendant's retail stores in the territory . : . [and] to sell dairy products within the relevant trade territory." Plaintiffs seek to enjoin the completion and operation of the processing plant upon the theory that if Kroger is permitted to complete and operate the plant, it will have monopoly power over dairy products in this trade territory and therefore is guilty of attempting to monopolize trade and commerce contrary to Section 2 of the Sherman Antitrust Act.

We start with the well established rule that for the purpose of the motion to dismiss, defendant admits the facts well pleaded in the complaint. What is alleged is that Kroger, with 200 retail stores, is presently constructing a facility by means of which it hopes to supply 20 per cent of the total demand for dairy products in this area including that satisfied in its own stores. Through its own retail outlets, Kroger is allegedly "assured" of selling 8 per cent of the market and thereby of using 40 per cent of the plant's maximum production capacity. However, it will be compelled to compete with other processors, including the giants of the industry, for another 12 per cent of the market. The remaining 80 per cent of the market will not be affected, except indirectly.

If we assume (as do plaintiffs) the inapplicability of the regulatory pricing legislation in some or all of the six states (Missouri, Iowa, Illinois, Kentucky, Tennessee, and Arkansas) in which the St. Louis, Missouri, Trade Territory, is located, and that no provision of the Clayton Act and the Federal Trade Commission Act will be a legal deterrent, Kroger will be free to and intends (so plaintiffs allege) to reduce below cost the price at which the milk products sold in its own stores will be offered to its customers, and thereby divert trade, not so much from the other dairy processors, as from the other food retailers with which Kroger competes.

In effect, the complaint charges that Kroger intends to use its power as the second largest food retailer to produce and sell dairy products in its own stores as "leaders" or "loss leaders" (without being hampered in so doing as it has been in the past), for the primary purpose of diverting trade from other food retailers to the Kroger stores, and thereby increasing defendant's over-all sales and profits. This, so plaintiffs contend, will result in monopoly power, as evidenced by two criteria, one, the partial control Kroger will have over prices by depressing or lowering them at will, and the other, the allegedly unfair advantage Kroger's "captive" market of 8 per cent will give it over other wholesalers of dairy products.

The complaint describes Kroger as maintaining "a highly integrated operation which includes the manufacturing, processing, distributing and retailing of a broad line of merchandise, and including fluid milk and other dairy and food products and a variety of none-edible household products." It is further alleged that Kroger owns or leases and operates bread and cracker bakeries, dairies, a coffee roasting plant, and a general manufacturing plant for producing and bagging candies, salad dressings, preserves, peanut butter, spices, coffee, extracts and other grocery items, as well as operating egg exchanges, a peanut plant in Georgia, and an evaporated milk plant in Indiana.

These allegations of themselves raise questions both as to whether the theory upon which plaintiffs are presently proceeding would be equally applicable to Kroger's existing integrated operation of its bakeries and dairies and its manufacture of a number of staple grocery items which are sold in its stores. So, too, we note the entire absence of any allegation that defendant has heretofore used its existing food processing and manufacturing facilities in

an attempt to monopolize the market for such products, or even that portion of the market represented by its own retail sales. Certainly, Kroger could use as "loss leaders" any of the other products it processes or manufactures, with the same intended result.

There is no charge that Kroger has monopoly power in the retail grocery field, and for such reason this is not a case of a company, having an existing monopoly, which then integrates vertically thereby creating a danger of an extension of its existing monopoly into the new market which it has entered. Conceivably, Kroger may intend to achieve monopoly power in the retail grocery field by diverting trade from its competitors as a result of the sale of dairy products at a loss. If so, it would appear that Kroger's actual intent would be to monopolize the retail food business (a matter with which plaintiffs have no concern) rather than to monopolize the unprofitable dairy processing portion of its business.

The basic question posed by the motion to dismiss is whether Section 2 of the Sherman Antitrust Act prohibits a large food retailer from continued internal expansion by constructing a plant in order to process one of the food products it sells (and for which it has a "captive" market of 8 per cent), the plant having a capacity, in excess of the retailer's present needs, of an additional 12 per cent of the total market.

Plaintiffs place major emphasis upon Kroger's control of the "captive market" of 8 per cent (Kroger's own retail stores) which, they contend, gives Kroger an unfair competitive advantage in selling dairy products. Plaintiffs' position, necessarily, is that by means of the plant in which it will process all fluid milk and dairy products to be sold in its stores (that is, supply all its own needs of such products), Kroger will exclude all other proces-

sors from selling to it and thereby monopolize that significant (8%) portion of the total market.[1] What plaintiffs are really saying, is that Section 2 of the Sherman Antitrust Act prohibits any large food retailer from manufacturing and processing any kind of merchandise it sells in quantity, at least if it intends to displace other processors which have theretofore supplied its need for such merchandise. We have been cited to no comparable case which has ever so held or which has condemned internal expansion by a food retailer to provide for its own requirements.

Plaintiffs rely on United States v. Aluminum Company of America, 2 Cir., 148 F. 2d 416. We see no analogy. *There, defendant, the giant of the industry, continually* anticipated increased demand by doubling and redoubling its capacity, thereby successfully deterring others from entering the market. Here, some 70 dairy processors now have 100 per cent of the market. Kroger, a newcomer in the processing field, but "assured" through its existing outlets of some 8 per cent of the market once its production facility is completed, contemplates entering into competition with those already in the market, and others.

At worst, Kroger will eliminate all competition for the 8 per cent of the market represented by its own stores, either by excluding its competitors from the "captive" portion of the market or by reducing the price at which

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[1] We seriously question whether the 8% of the market represented by sales of fluid milk and dairy products to Kroger customers is truly a "captive" one. In this day and age, in which ultimate consumers are brand-name conscious, it does not necessarily follow that all Kroger customers who (for example) purchase Sealtest brand milk or ice cream will accept similar Kroger brand products, even at a reduced price. The situation is wholly unlike that of a steel manufacturer attempting to gain control of steel fabricators, in which event the market for the steel to be fabricated would be a "captive" one.

the milk products in its stores are sold to a level below that which the others can profitably sell to Kroger. These facts, even assuming a wrongful intent, are in our judgment insufficient to entitle plaintiffs to an injunction to prevent Kroger from constructing or completing its contemplated processing plant.

The major fallacy in plaintiffs' argument is that in essence it is premised not so much on what Kroger has done and is actually doing, but on what Kroger allegedly intends to do in the future. True, the present intent to destroy competition or build monopoly is essential to a finding of an "attempt to monopolize" (Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 626), but the attempt must be evidenced by the actions done with such intent. Here, the sole actions of Kroger, as set forth in the complaint, are (1) the operation in this trade area of 200 retail food stores, and (2) the construction of a dairy processing plant to supply its own needs (with an excess capacity with which it will compete for a portion of the remaining market). When the latter action of Kroger is carried to completion, Kroger will be enabled to sell its own products, manufactured in its own plant, at retail in its own stores at whatever price it chooses, and in addition will be enabled to compete with other dairy processors for 12 per cent of the remaining market.

We hold that the mere construction of the processing plant by Kroger will not constitute a violation of Section 2 of the Sherman Antitrust Act. It may well be (and as to this we express no opinion), that Kroger's conduct and acts subsequent to the completion of the plant will be such as to entitle plaintiffs to relief, either injunctive or otherwise.

Defendant has not questioned the propriety of the class action procedure. There is, however, a serious question

concerning the applicability of Rule 23 to the instant factual situation, a question we do not now determine in view of our basic ruling. We note the absence of any allegation that the named plaintiffs, or any of them, presently sell fluid milk or any other dairy products to Kroger, or if so, which products and in which part of the trade territory. So, too, the named plaintiffs do not allege to what extent, they, or any of them, do business in any one or more of the towns and cities in which Kroger operates retail food stores in the 6-state area, or the extent to which the named plaintiffs are affected by Kroger's sales therein of any specific dairy product. Moreover, plaintiffs do not explain the significance of their use of the term "St. Louis, Missouri, Trade Territory", unless by that term is simply meant the area in which are located the Kroger stores which Kroger intends to supply out of the processing plant being constructed.

In the present posture of the case, we conclude that plaintiffs have failed to state a claim upon which relief can be granted, and that defendant's motion to dismiss should be and it is hereby sustained.

Dated this 28 day of August, 1967.

/s/ JOHN K. REGAN,
United States District Judge.

APPENDIX B.

Opinion.

United States Court of Appeals
for the Eighth Circuit.

No. 19,122

Hiland Dairy, Inc., Reiss Dairy, Inc., and Sunny Hill Farms Dairy Company, Inc.,
Appellants,

v.

The Kroger Company,
Appellee.

} Appeal from the United States District Court for the Eastern District of Missouri.

[October 31, 1968.]

Before Van Oosterhout, Chief Judge; Gibson and Bright, Circuit Judges.

Gibson, Circuit Judge.

Appellants, plaintiffs below, seek a trial on the merits of their class complaint against appellee, The Kroger Company, for an alleged attempt to monopolize the milk and

dairy business in the St. Louis, Mo., Trade Territory in violation of § 2 of the Sherman Anti-Trust Act, 15 U.S.C. § 2. The District Court[1] dismissed the complaint on motion for failure to state a claim on which relief could be granted.

The plaintiffs, Highland [sic] Dairy, Inc., Reiss Dairy, Inc., and Sunny Hill Farms Dairy Company, Inc., are engaged in the buying and processing of raw milk and distributing and processing of fluid milk and other dairy products at wholesale and retail in the St. Louis, Mo., Trade Territory, a geographical area denominated by them as an area within 250 miles more or less of St. Louis, Missouri. Highland [sic] Dairy has its principal office at Springfield, Missouri; Reiss Dairy at Sikeston, Missouri; and Sunny Hill Farms Dairy at Cape Girardeau, Missouri. Defendant, The Kroger Company, operates a national chain of retail grocery stores approximately 1500 in number located in 30 states, with its principal office at Cincinnati, Ohio. It is alleged to be the second largest retail food chain in the United States and has net annual sales exceeding 2.6 billion dollars. In addition to the retail stores, Kroger operates other plants and businesses, bakeries, dairies, a coffee roasting plant and various food and non-edible product enterprises that complement and are allied to its overall operation as a food chain. It has more than 200 retail stores in the St. Louis Trade Territory (located in Missouri, Iowa, Illinois, Kentucky, Tennessee, and Arkansas) in which it sells approximately 8 per cent of the processed fluid milk and other dairy products at the retail level. The plaintiffs-appellants will be referred to in this opinion as "plaintiffs" and the defendant-appellee as either "defendant" or "Kroger."

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[1] The District Court's Memorandum Opinion by The Honorable John K. Regan is reported at 274 F. Supp. 966 (E. D. Mo. 1967).

Plaintiffs' complaint seeks to enjoin Kroger from building a dairy processing plant in the St. Louis Trade area, having a capacity to supply more than 20 per cent of the total consumers' demand, on the basis that such plant would give Kroger the power to impose unreasonable restrictions on the sale and distribution of fluid milk and other dairy products in interstate trade and would constitute an attempt to monopolize in violation of § 2 of the Sherman Anti-Trust Act.

This is not a case of a conspiracy, combination or merger to violate §§ 1 and 2 of the Sherman Act, nor is it one based on the commission of acts, lawful or otherwise, that place an unreasonable restriction on competition or lessen competition; but represents an attempt to keep Kroger out of the dairy field on the charge in the complaint that the entry into this field constitutes an attempt to monopolize under § 2 of the Act. The gist of the complaint is that the building of the plant with the specific intent to monopolize constitutes a proscribed attempt to monopolize under § 2.[2]

Plaintiffs' position is that the purpose of §§ 1 and 2 of the Sherman Anti-Trust Act is to prevent monopolistic restrictions on competition and that every act or transaction, regardless of form, that has for its purpose the restriction of competition is prohibited under the Act. They recognize the teaching of *The Standard Oil Company of New Jersey v. The United States*, 221 U. S. 1, (1911) that qualifies the proscription to unreasonable restrictive acts as noted at p. 58: "all contracts or acts which were

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[2] Section 2 of the Sherman Anti-Trust Act, 15 U. S. C., § 2, reads:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, * * * shall be deemed guilty of a misdemeanor * * *."

unreasonably restrictive of competitive conditions'' and at p. 60 to any ''undue restraint'' of commerce, as measured by the common law standard of reasonableness. Contracts or acts under the common law standard could be unreasonably restrictive (1) when inherently so, ''from the nature or character of the contract or act'' (2) inferentially, where ''the surrounding circumstances'' are such as to justify the conclusion that they were entered into not for bona fide competitive reasons but in order to gain by injuring competition through price, production, or quality control, *Standard Oil, supra* at 58.[3]

The essential doctrines of *Standard Oil* have been adhered to by the Court in succeeding cases. Concededly, the purpose of the Sherman Act is to preserve a system of free competition. This means no unreasonable or undue restraints are to be imposed on our competitive economic system so as to hinder or retard the free interplay of vital competition in the marketplace. The public is to be protected from the evils incident to monopolistic practices.

Plaintiffs admit that under § 2 the attempt to monopolize must be ''likely to accomplish'' monopolization, *Kansas City Star Company v. United States,* 240 F. 2d 643, 663 (8 Cir. 1957), cert. denied 354 U. S. 923, or afford a ''dangerous probability of'' monopolization, *American Tobacco Co. v. United States,* 328 U. S. 781, 785 (1946). Specific intent to monopolize must be well pleaded and proved. They, however, contend that Kroger's acquisition by in-

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[3] While a literal reading of the Sherman Act would condemn every contract or act that restricts the competitive operation of others, the Court recognized the necessity of applying the "rule of reason" in its interpretation of the statute, holding that only contracts or acts resulting in unreasonable or "undue" restraint of trade are prohibited. *Standard Oil, supra,* at 62 of 221 U. S. In other words, honest and bona fide competition, even if restrictive of competitive conditions, is not a violation of the Act, as the success and growth of one competition [sic] often means injury to another.

ternal expansion of a dairy facility with capacity to supply 20 per cent of the market would be likely to accomplish monopolization under present trade practices; would enable Kroger to impose handicaps on competitors; and Kroger's motive for acquiring power to control prices in milk processing is to use dairy "loss leaders" to get more store traffic and thus increase its volume and its profit margin on other retail sales.

Kroger maintains the complaint on its face is insufficient to show any possibility of a finding of "dangerous probability of monopoly" which is a prerequisite to an illegal attempt to monopolize; that Kroger's alleged 20 per cent of the market is far short of the minimum necessary to achieve monopoly; that Kroger under the admitted facts will not have the capacity to raise prices or exclude competition at will; that the complaint lacks the requisite allegations of any conduct establishing a specific intent to monopolize; that Kroger's internal expansion is sanctioned by the anti-trust laws; and that the plaintiffs seek to use the anti-trust laws to freeze market shares and to insulate them from the impact of competition—a subversion of the anti-trust laws.

The District Court viewed the complaint as insufficient, pointing out that no case has ever condemned internal expansion by a food retailer to provide for its own requirements; that the fact the market is being adequately served by the plaintiffs as a class is immaterial; that the mere building of the plant, even with the intent of using milk sales as a "loss leader," does not show a present intent of an attempt to monopolize; and concluded that § 2 of the Sherman Act does not prohibit internal expansion of a large food retailer to supply its own 8 per cent share of the market and an additional 12 per cent of the wholesale

market. The District Court reasoned at 969 of 274 F. Supp.: "* * * [T]he present intent to destroy competition or build monopoly is essential to a finding of an 'attempt to monopolize' (*Times-Picayune Pub. Co. v. United States,* 345 U. S. 594, 626, 73 S. Ct. 872, 97 L. Ed. 1277), but the attempt must be evidenced by the actions done with such intent." and then held:

> "* * * [T]he mere construction of the processing plant by Kroger will not constitute a violation of Section 2 of the Sherman Antitrust Act. It may well be (and to this we express no opinion) that Kroger's conduct and acts subsequent to the completion of the plant will be such as to entitle plaintiffs to relief, either injunctive or otherwise."

At the threshold of this review we are confronted with the contention that a motion to dismiss is not a proper procedure to test the merits of plaintiffs' case as the plaintiffs have not had opportunity to elaborate and adduce evidence in support of their allegations. We likewise feel that a motion to dismiss and even a summary judgment proceeding do not generally afford a satisfactory vehicle for disposing of complex issues. The United States Supreme Court in *First National Bank of Arizona v. Cities Service Co.,* 391 U. S. 253 (1968), however, approved the use of a summary judgment procedure in a complex anti-trust action, stating at 288:

> "Thus neither precedent nor logic supports petitioner's contention that the evidence to which he points is significantly probative of conspiracy and, therefore, we hold that on the facts as shown summary judgment was correctly awarded to respondent."

and rejected the contention that Rule 56 (e), Fed. R. Civ. P., is not applicable to complex anti-trust cases and that plaintiffs should have a hearing on the merits of their

complaint either before the court or a jury, with this pertinent observation, at 290:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an anti-trust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

Although we realize that a summary judgment proceeding presents different considerations than does a motion to dismiss, we think the same rationale can be applied in disposing of litigation on a motion to dismiss where well-pleaded allegations are not sufficient to base a claim upon which relief can be granted. And there is nothing in the nature of complex anti-trust litigation that would make inapplicable this procedure.

A motion to dismiss for failure to state a cause of action can serve a useful purpose in disposing of legal issues with a minimum of time and expense to the interested parties and is applicable to an anti-trust complaint. In testing the legal sufficiency of the complaint the well-pleaded allegations are taken as admitted but conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted. See, 2A, Moore's Federal Practice § 12.08, p. 2244.

The well-pleaded allegations are that Kroger is a large national chain possessing great assets and presently controlling 8 per cent of the market in question, that it intends to (and did)[4] build a processing plant for milk and

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[4] While plaintiffs sought an injunction to enjoin Kroger from building the dairy facility they did not ask for a restraining order nor post a bond for a preliminary injunction. Now, that which

dairy products capable of supplying 20 per cent of that market which includes its captive market of 8 per cent that it uses milk as a "loss leader", that existing processors have a capacity to and are effectively serving the needs of the territory, present and future, that the dairy facility will endow Kroger with the power to lower prices but not to raise prices, that it may attract customers by the use of milk as a "loss leader" and sell to these customers other items at higher prices, and that plaintiffs would be adversely affected by the entry of Kroger in the wholesale dairy market.

Accepting plaintiffs' premise that the Sherman Act prohibits any kind of act or practice that unduly restrains trade or monopolizes, we do not think any case has gone as far as the plaintiffs seek to journey in this one of protecting their market shares from competition of an internal expansion of Kroger into the St. Louis, Mo., Trade Territory; nor do we think the well-pleaded facts allege an attempt to monopolize in violation of § 2 of the Sherman Act.

Plaintiffs cite many cases dealing with a monopolization of the market and cases of unfair or predatory practices that unduly restrict competition. *United States of America v. American Tobacco Company,* 221 U. S. 106 (1911) concerns a combination in restraint of trade, and exaction of unreasonable agreements not to compete and price-cutting to eliminate competitors; *Eastern States Retail Lumber Dealers' Association v. United States,* 234 U. S. 600 (1914), a refusal by retailers to buy from wholesale lumber dealers who sold directly to customers,—a combination and a conspiracy in restraint of trade; *Eastman Kodak Company*

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they sought to enjoin having already been built, plaintiffs admit that their prayer should be changed to a request that Kroger be not allowed to attempt to monopolize the milk business.

of New York v. Southern Photo Materials Company, 273 U. S. 359 (1927), purchase of competitors, unreasonable agreements not to compete, and retail price-fixing; *Story Parchment Company v. Patterson Parchment Paper Company,* 282 U. S. 555 (1931), conspiracy to maintain uniform prices and price-cutting to eliminate a competitor; *United States v. Swift & Company,* 286 U. S. 106 (1932), divisions of territories, control of market journals and stockyard facilities; *United States v. Pullman Co.,* 50 F. Supp. 123 (E. D. Pa. 1943), aff'd per curiam 330 U. S. 806, exclusive dealing, refusal of service except in Pullman-owned cars, control of manufacture of sleeping cars, long-term contracts. These and many other cases dealing with conspiracies, monopolistic control of the market, tie-in sales and price-cutting to eliminate competitors are not in point. All of those cases are concerned with either an actual or a dangerous probability of monopolization of the market, or deal with actual acts or conduct that have the present effect of unduly restricting competition.

An unlawful attempt to monopolize presupposes a "dangerous probability" of monopolization if the attempt is successful. *American Tobacco Co. v. United States,* 328 U. S. 781, 784-85, 815 (1946); *Kansas City Star Company v. United States,* 240 F. 2d 643, 663 (8 Cir. 1957), cert. denied 354 U. S. 923; *John Wright & Associates, Inc. v. Ullrich,* 328 F. 2d 474, 478 (8 Cir. 1964). Twenty per cent alone of a market would be insufficient to achieve a monopoly. While size is an earmark of monopoly power,[5] a substantial part of the market must be controlled by the monopolist to enable the raising and lowering of prices and the undue restriction on competition. Of nine cases condemning monopolies under § 2 of the Act the percentage

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[5] See, Report of Attorney General's National Committee to Study the Antitrust Laws (1955) at 49.

of market share ranges from 70 per cent in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 167 (1948), to 100 per cent in the *United States v. Pullman Co., supra.*[6]

The United States Supreme Court in *United States v. United States Steel Corporation*, 251 U. S. 417, 444 (1920) refused to hold a monopoly existed on a market share of 50 per cent or less, reasoning "[t]he power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved * * *." In considering the question of monopoly in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 424 (2d Cir. 1945), the Court held defendant's 90 per cent of the market was a monopoly but that "* * * it is doubtful whether sixty or sixty-four per cent would be enough and certainly thirty-three per cent is not."

We need not decide in this case what percentage less than 50 per cent alone might produce a monopoly under certain circumstances peculiar to the market concerned, but we do think a 20 per cent market share under the circumstances

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[6] The nine cases considered are:

	Per Cent Market Share
United States of America v. American Tobacco Company, 221 U. S. 106, 162 (1911)	86%
The Standard Oil Company of New Jersey v. The United States, 221 U. S. 1, 33 (1911)	90%
United States v. Eastman Kodak Co., 226 F. 62, 79 (W. D. N. Y. 1915), *appeal dismissed*, 255 U. S. 578	75-80%
United States v. Pullman Co., 50 F. Supp. 123, 135 (E. D. Pa. 1943), *aff'd per curiam*, 330 U. S. 806	100%
United States v. Aluminum Co. of America, 148 F. 2d 416, 425 (2d Cir. 1945)	90%
United States v. Paramount Pictures, Inc., 334 U. S. 131, 167 (1948)	70%
United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 343 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521	75%
International Boxing Club of New York, Inc. v. United States, 358 U. S. 242, 249 (1959)	81%
United States v. Grinnell Corp., 384 U. S. 563, 567 (1966)	87%

of this case is competitively inadequate to sustain a monopoly and thus permit price dictation and the ability to exclude competition. In *Kansas City Star, supra,* this Court quoting *American Tobacco Co. v. United States,* 328 U. S. at 811, recognized that the hallmark of monopoly is that "* * * *power exists to raise prices or to exclude competition when it is desired to do so.*" 240 F. 2d at 663. Admittedly Kroger will not possess the power to raise milk prices. The power to lower milk prices by using milk as a "loss leader" and recouping by higher prices on other items will not bear analysis as Kroger concededly has no monopoly in the retail grocery field. Its ability to raise prices above the market on other items appears speculative and is not warranted in view of the general competition in the market place. Also in the wholesale market for milk and dairy products its position is inferior to the combined shares of 67 other processors (including some of the giants of the industry, such as National Dairy Products, Foremost, Borden), possessing ample capacity to supply the entire market. Plaintiffs admit in their brief that "Kroger will be a newcomer in milk processing, have a relatively small share of the market, and will face competition from already established competitors some of whom are national giants in the milk business." Kroger's entry in the wholesale market in St. Louis, Mo., Trade Area will increase competition and will probably adversely affect many of the present operators, but it would not establish a monopoly for Kroger in that field. The "loss leader" argument does not present a present basis for relief as (1) it cannot be the predicate for attaining monopoly and (2) it ignores state and federal laws and Federal Trade Commission regulations against predatory trade practices. Kroger still must comply with rather extensive state laws on milk processing and distribution

and with the general requirements of the Sherman Act proscribing acts that unreasonably restrict competition. Kroger could not operate at ruinous wholesale prices as it lacks the market dominance to recoup on other grocery items, it admittedly not having a monopoly in that field, nor does it appear that it could achieve ultimate power to raise dairy prices at will in order to recoup. This does not mean that Kroger has, nor does the District Court's decision clothe Kroger with, the right to indulge in predatory practices, in unfair competition or in the commission of acts that would unreasonably restrict competition.

Plaintiffs' complaint is not based on unfair trade practices or acts unduly restrictive of competition but on the subjective intent of Kroger to attempt a monopolization of the market in the dairy field. The complaint fails to allege acts or conduct which would show the requisite intent. A mere allegation of an attempt to monopolize is a conclusion of law and about all anyone could say is that Kroger would have the power potentially to engage in some unfair and predatory practices in this field, but there is no showing of unfair or predatory practices. And any future operations are subject to the proscription of federal and state laws that condemn monopolies and unfair and predatory trade practices that unduly restrict competition.

The specific intent necessary to support an attempted monopolization under § 2 must be shown by conduct or acts from which a wrongful intent can be inferred. *Union Leader Corporation v. Newspapers of New England, Inc.*, 284 F. 2d 582, 584 (1st Cir. 1960), cert. denied 365 U. S. 833; *Kansas City Star Company v. United States, supra*, 663 of 240 F. 2d. No present acts are here alleged nor is there any allegation that Kroger has used its existing food processing and manufacturing facilities in an attempt to

monopolize the market for its other products. Kroger, under plaintiffs' theory, could use as a "loss leader" any of the other products it processes or manufactures to monopolize the market for such products. It has not done so and probably could not do so, even if desired, as it has not achieved a dominance of the market necessary to create a monopoly.

As a general proposition internal expansion is preferable to growth by merger or purchase. As viewed in *United States v. Philadelphia National Bank,* 374 U. S. 321, 370 (1963) "* * * corporate growth by internal expansion is socially preferable to growth by acquisition." And as analyzed in *Brown Shoe Co., Inc. v. United States,* 370 U. S. 294, 345 f.n. 72 (1962):

> "A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output."

The only case condemning internal expansion is *United States v. Aluminum Co. of America,* 148 F. 2d 416, 430 (2d Cir. 1945). This case is unique as the Aluminum Company had a present monopoly of the market, of 90 per cent (as an original entry in a new field—*American Tobacco Co., supra* at 786 of 328 U. S.) and had kept increasing its capacity to anticipate future needs so as to discourage and eliminate competition. These facts are not applicable to the dairy market.

This brings us to the line of cases cited by plaintiffs holding that certain acts in the nature of unfair trade

practices violated the Sherman Act. *Kansas City Star Company v. United States, supra,* condemned a tie-in advertising practice and a blacklisting of firms that patronized a competitor. *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U. S. 207 (1959) condemned the practice of an appliance chain restricting competition by using its buying power to deny a source of competitive supply to the plaintiff, thus placing the plaintiff at a competitive disadvantage in not being able to purchase certain brands of refrigerators, stoves, washing machines and electronic equipment on the same terms of sale and delivery as the defendant. *Klor's* held that this practice had a monopolistic tendency which interfered with the natural flow of an appreciable amount of interstate commerce, at 211 of 359 U. S. In *Simpson v. Union Oil Co. of California,* 377 U. S. 13 (1964), the Court found that termination of the lease of a retail dealer for refusal to comply with a resale price maintenance scheme constituted an actionable wrong as a restraint of trade or monopolistic practice that had an impact on the market. *Poller v. Columbia Broadcasting System, Inc.,* 368 U. S. 464, 468-9 (1962) viewed the cancellation by CBS of an affiliate TV station in Milwaukee and the purchase of another TV station there by it as sufficient to sustain an anti-trust action under § 2 against a summary judgment attack where these acts were alleged to constitute "* * * unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize," [stating that] "then such conduct might well run afoul of the Sherman Law." The giving of secret rebates, *Bergjans Farm Dairy Co. v. Sanitary Milk Producers,* 241 F. Supp. 476, 483, 485 (E. D. Mo. 1965), *aff'd, Sanitary Milk Producers v. Bergjans Farm Dairy Incorporated,* 368 F. 2d 679 (8 Cir. 1966), and other cases cited by the plaintiffs all condemn the undue restriction of competition. Market dominance or mo-

nopoly is not a prerequisite in this type of case because the acts complained of, even if lawful, have an unreasonable restraint on trade and unduly hinder the free flow of competition.

In the case at bar there are no acts or conduct alleged which the plaintiffs would have the court condemn except the building of the dairy facility. This in itself is not an unfair competitive act or predatory trade practice. Plaintiffs contend that Kroger would acquire a strategic aspect of the market with its dairy facility, but this appears too speculative and not warranted under the facts alleged in the complaint and is thus insufficient to prohibit Kroger's entry into this field by way of internal expansion.

In dealing with § 7 of the Clayton Act (15 U.S.C. § 18), the United States Supreme Court in *Brown Shoe Co., Inc. v. United States,* 370 U. S. 294, 320 (1962) said "* * * the legislative history illuminates congressional concern with the protection of *competition,* not *competitors* * * *." Plaintiffs' market shares are not protected by the antitrust laws and they have no legal basis for precluding competition of Kroger in their field. This is all the District Court held and, of course, is the narrow holding of our affirmance upon appeal. Plaintiffs are not foreclosed by this decision in protecting themselves against any unfair trade practice or predatory acts that are unreasonably restrictive of competition in violation of the antitrust and other laws.

Judgment affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C.

Organization and Competition in the DAIRY INDUSTRY

Technical Study No. 3 • National Commission on Food Marketing • June 1966

percent of consumption was distributed through the Commodity Credit Corporation (CCC) and special school programs. The decline in consumption of milk on farms has been offset by the increase in distribution through Government programs. Use of dairy products by the military remained relatively constant from 1962 to 1965.

Per Capita Consumption

The civilian per capita consumption of milk and dairy products has been declining since the 1930's. In 1965 the total milk equivalent consumption of all dairy products was 620 pounds, a 16 percent decline from 1950 (table 1–7). The growth in population has offset the per capita decline, and total consumption has increased.

Per capita consumption of individual dairy products has shown considerable variation in the past 15 years (table 1–8). Some products that registered declines in per capita consumption from 1950 to 1965 were evaporated milk, −53 percent; butter, −38 percent; fluid cream products, −36 percent; and fluid whole milk, −9 percent. The largest gains were for low fat products such as ice milk, 458 percent; sherbert, 114 percent; nonfat dry milk, 62 percent; and cottage cheese, 48 percent.

Per capita consumption declines reported on a milk equivalent basis may be misleading because the changing fat content of various products and

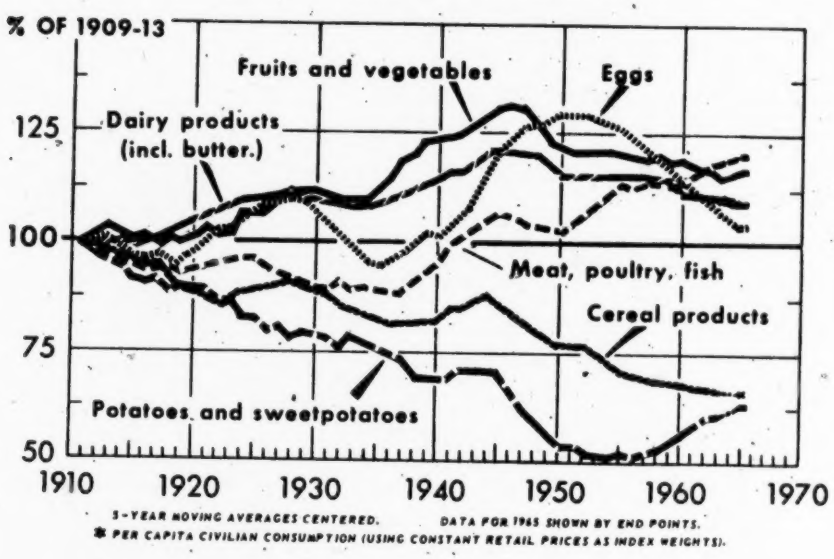
consumption, United States, 1950–65

Evaporated and condensed (pounds)			Frozen products (pounds)					Dry milk products (pounds)				
Evaporated whole milk	Condensed whole milk	Evaporated and condensed skim milk	Ice cream	Ice milk	Sherbert	Other frozen dairy products	Mellorine	Dry whole milk	Nonfat dry milk	Dry butter milk	Dry whey	Malted milk
18.1	2.0	5.1	17.2	1.2	0.7	0.3	--------	0.3	3.7	0.2	0.2	0.2
16.3	2.0	4.8	17.4	1.5	.9	.4	--------	.3	4.2	.1	.1	.2
15.7	1.9	4.7	17.9	1.8	1.1	.4	0.4	.5	4.6	.2	.2	.2
15.4	2.0	4.8	18.0	2.1	1.3	.4	.7	.2	4.2	.2	.2	.2
14.8	2.0	4.9	17.4	2.6	1.4	.2	.9	.2	4.5	.2	.2	.2
14.2	2.0	4.7	18.0	2.9	1.5	.1	1.0	.2	5.5	.2	.2	.2
13.6	2.2	4.5	18.0	3.3	1.4	.1	1.0	.3	5.2	.3	.2	.2
13.1	2.3	4.6	18.0	3.6	1.4	.1	1.0	.2	5.3	.3	.3	.2
12.3	2.5	4.2	17.8	3.8	1.4	.1	1.1	.3	5.6	.4	.3	.2
11.9	2.5	4.6	18.7	4.2	1.5	.2	1.2	.3	6.2	.4	.3	.1
11.2	2.5	4.5	18.3	4.5	1.5	.2	1.2	.3	6.2	.4	.3	.1
10.7	2.6	4.8	18.0	5.0	1.4	.1	1.3	.3	6.2	.4	.3	.1
10.1	2.4	4.8	17.9	5.6	1.4	.2	1.3	.3	6.1	.4	.3	.1
9.4	2.2	4.5	18.0	6.0	1.5	.2	1.3	.3	5.8	.4	.3	.1
9.0	2.3	4.7	18.2	6.4	1.5	.2	1.3	.3	6.0	.4	.4	.1
8.5	2.4	4.7	18.3	6.7	1.5	.2	1.3	.3	6.0	.4	.4	.1
−53	+20	−8	+6	+458	+114	−33	[7] +225	0	+62	+100	+100	−50

[6] Partly forecast.
[7] 1962 to 1965.

Source: U.S. Department of Agriculture, Economic Research Service, *Dairy Situation*, DS-308, November 1965, p. 22

Figure 3. TRENDS IN U.S. EATING HABITS*



product groups is not fully taken into account. For example, the per capita consumption of fluid milk and low-fat milk, on a milk equivalent basis, declined 47 pounds between 1950 and 1965, with most of the decline occurring before 1961. During this same period the per capita consumption of fluid milk, cream, and low-fat milk on a product-weight basis, declined by only 30 pounds. Some of the decline in per capita consumption of whole fluid milk and cream was offset by an increase in the per capita consumption of low-fat milk from 1957 to 1965.[9]

Many of the changes in the consumption of dairy products are the result of shifting consumer preferences. Cereal and potato products have declined in importance in the total diet, while meat products have increased in importance (fig. 3). Also, products associated with a high fat and cholesterol content, including eggs and some dairy products, are declining in consumption, while numerous products with a high protein content are increasing in consumption.

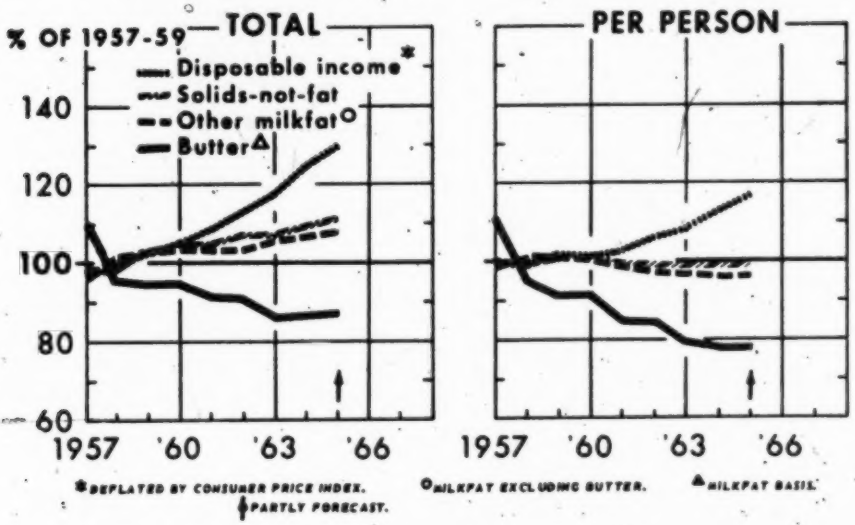
When examined on a milk component basis, per capita consumption of butterfat and butter have declined; the per capita consumption of solids-not-fat has been stable (fig. 4).

Factors Affecting Consumption

Substitution between milk and vegetable fat affects the consumption of each. From 1955 to 1964, retail butter prices averaged 2.6 times those of margarine. This price difference was greater than the difference prior to

[9] U.S. Department of Agriculture, Economic Research Service, *Dairy Situation*, DS–308, November 1965, p. 22.

Figure 4. CONSUMPTION OF MILK SOLIDS AND DISPOSABLE INCOME



World War II.[10] During the 1955–64 period, the consumption of butter declined and margarine increased as consumers' use shifted. In addition, less expensive vegetable fat was substituted for butterfat in some processed products. Two examples are reconstituted or filled milk and mellorine.[11]

Retail prices of dairy products affect consumption. The demand for dairy products is generally considered to be inelastic—that is, an increase in price will be accompanied by a less than proportional decrease in consumption. Fluid products are considered to have a more inelastic demand than manufactured products. Higher prices for some manufactured products can lead more readily to the substitution of lower cost commodities, e.g., margarine for butter.

The index of retail prices for all dairy products has risen since 1950 (fig. 5). Ice cream has shown a downward trend in price, while processed cheese has shown an upward trend. Milk sold in stores increased in price up to 1960 but then declined through 1965. Price declines for ice cream and for milk sold in stores were a result of improved methods of distribution, more competition for fewer outlets, a decline in the average butterfat content, and increased use of private label; an additional factor was the use of lower cost ingredients in ice cream mix. Higher prices for some dairy products were the result of higher costs for labor, transportation, packaging, rent, taxes, buildings and equipment, and other marketing services.

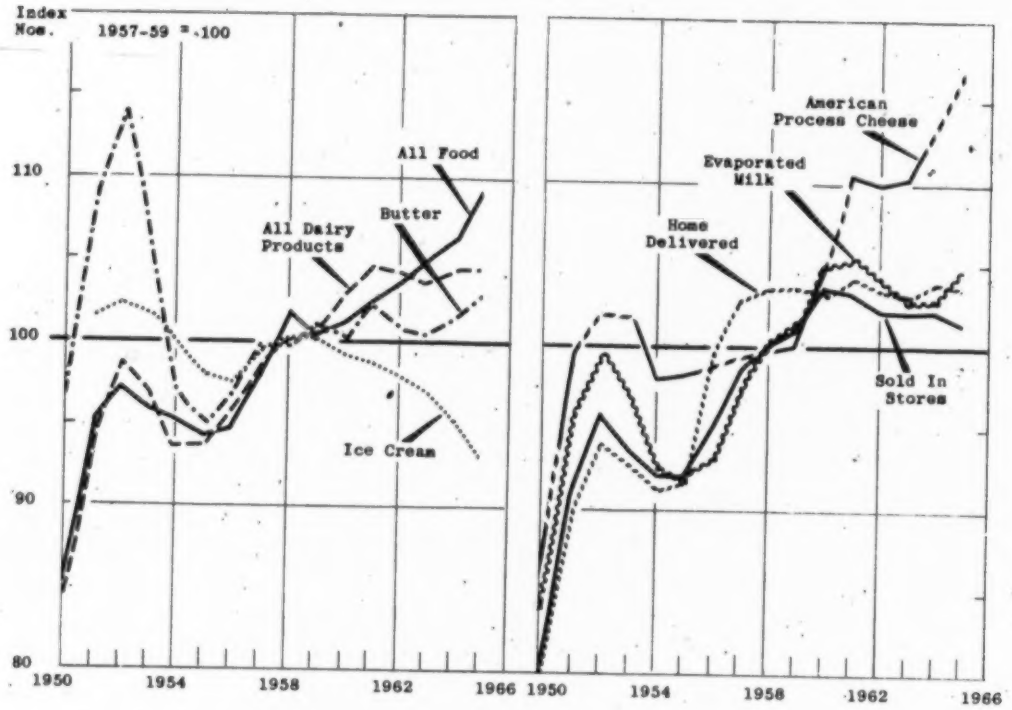
Young people usually consume more dairy products than older people; therefore, the age distribution of the population influences consumption.

Distribution of milk through special Government programs such as national school lunch program, special milk program, and direct distribution

[10] U.S. Department of Agriculture, Economic Research Service, *Dairy Situation*, DS–308, November 1965, p. 36.

[11] Mellorine is a frozen product similar to ice cream but using vegetable fat as a substitute for all or part of the butterfat, see chap. 16.

Figure 5. INDEX OF RETAIL PRICES FOR ALL FOODS, ALL DAIRY PRODUCTS AND SELECTED DAIRY PRODUCTS, 1950 TO 1965



SOURCE: U. S. Department of Agriculture, Farm-Retail Spreads For Food Products, ERS-226, Apr. 1966, and MTS-160, Feb. 1966.

have influenced consumption. In 1964, 5 percent of the total fluid milk consumption was through school programs.[12]

While the effects are hard to document, diet fads and health scares probably have influenced milk consumption. Some dairy products are objected to because they are high in fat or cholesterol. Reports of radioactive fallout probably have had an adverse effect on the consumption of fluid milk.

Outlook

Per capita consumption of milk and most dairy products appears to be stabilizing. The most important factors affecting the future demand for dairy products will continue to be changes in population, income and consumer preferences.

Between 1955 and 1965, total milk equivalent consumption increased 365 million pounds per year. Assuming the same rate of increase continues, by 1975 the total milk equivalent consumption from commercial sources will be about 121 billion pounds, compared to 117.7 billion pounds in 1965.

Per capita consumption of various dairy products probably will follow the trends of recent years. Products high in fat will decline in per capita consumption while those low in fat will increase. Per capita consumption of butter will decline, but at a slower rate, as will evaporated milk. Low-fat fluid milk, nonfat dry milk, low-fat frozen desserts and cheese are likely to increase in per capita consumption.

New low-fat dairy products and nondairy substitutes will replace some of the consumption of similar products higher in fat. These will include low-fat varieties of cheese and frozen desserts and substitute products such as nondairy coffee whiteners.

IMPORTS

A number of dairy products, including several types of cheese, butter, malted milk, butteroil and dried milks, are covered by specific import quotas. Imports of other dairy products, while not formally restricted, may be limited by agreement between the United States and the exporting countries. Nonquota imports of dairy products into this country are influenced by domestic prices, foreign prices, and foreign milk production.

Some dairy products not under import quotas are used in processing. Colby, a variety of cheese similar to cheddar, is used in processed cheese; cream and mixtures of cream and sugar are incorporated into ice cream mix. Imports of these products replace domestic production and divert domestic supplies into lower price outlets, often as surplus which may end up in Government storage.

Total imports on a milk equivalent basis have been small. In 1965, imports were just over 900 million pounds, when total production was more than 125 billion pounds. Imports of nonquota products, on a milk equivalent basis, were more than three times as great as for quota products (table 1–9). When measured as a percent of total supply, imports of milkfat and solids-not-fat were below 1 percent in 1965 (table 1–10).

[12] U.S. Department of Agriculture, Economic Research Service, *Dairy Situation*, DS–308, November 1965, p. 24.

TABLE 5-2.—*Value of shipments of fluid milk products, 1963*

Product or item	Value [1]	Share of total value
	Millions	*Percent*
Packaged milk and cream	$4,285	71
Bulk milk and cream	951	16
Flavored milk, drinks, yogurt	253	4
Cottage cheese	189	3
Unspecified	339	6
Total	6,017	100

[1] Includes value of these products produced as secondary products by establishments in other industries. Also includes value of interplant transfers.

Source: U.S. Bureau of the Census, *Census of Manufactures: 1963, Dairies*, Report MC 63(2)-20B, table 6A.

NUMBER AND TYPES OF FIRMS

In January 1965, 5,041 companies or individual proprietors were engaged in the processing of fluid milk products (table 5-3). Two-thirds of these firms, 3,364, were processor-distributors and one-third, 1,677, were producer-dealers. Processor-distributors, which specialize in processing and distribution, accounted for all but 1 to 2 percent of total U.S. sales in 1964. Producer-dealers are dairy farmers who have integrated into processing and distribution of milk from their own herds. Producer-dealer operations are usually small and not considered a part of the commercial dairy processing industry.

Various types of firms were among the 3,364 processor-distributors. Nine firms were national or nearly so in the scope of their total (including non-dairy) operations. These were National Dairy Products Corp. (Sealtest), Pet Milk Co., The Borden Co., Beatrice Foods (Meadow Gold), Fairmont Foods, Foremost Dairies, Carnation, Safeway Stores, and Kroger Co. These firms, although less than 1 percent of the total processor-distributors, operated more than 7 percent of the fluid milk processing plants in 1965.

Eight firms operated regionally in 1965. These were Arden-Mayfair, Bowman Dairy Co., Dean Foods, Hawthorn-Mellody, Southland Corp., Consolidated Foods (Lawson Milk Co.), H. P. Hood & Sons, and Cumberland Farms. These firms operated about 2 percent of the total fluid milk processing plants.

Local proprietary single plant firms accounted for the bulk of all processor-distributors. In 1965, they accounted for 91 percent of the commercial firms and operated more than three-fourths of the plants. Local proprietary firms with more than one plant were 3 percent of total commercial firms and operated 6 percent of the plants.

Farmer-cooperatives accounted for 5 percent of the firms operating as processor distributors in 1965. Among these cooperatives, single-plant operations were more frequent than multiplant operations.

TABLE 5-3.—*Number of companies operating fluid milk processing plants, by nature of operation and type of firm, January 1965*

Nature of operation and type of firm	Companies or firms		Plants operated	
	Number	Percent	Number	Percent
Nature of operation:				
Processor-distributor	3,364	67	3,920	70
Producer-dealer	1,677	33	1,677	30
Total	5,041	100	5,597	100
Type of firms operating as processor-distributors:				
National [1]	9	0.3	291	7.4
Regional [2]	8	0.2	76	2.0
Local proprietary:				
Multiplant	100	3.0	226	5.8
Single plant	3,062	91.0	3,062	78.1
Local cooperative:				
Multiplant	35	1.0	115	2.9
Single plant	150	4.5	150	3.8
	3,364	100.0	3,920	100.0

[1] Refers to geographic scope of a firm's total activities rather than just milk processing. Includes National Dairy, Beatrice, Borden, Carnation, Foremost, Safeway, Fairmont, Pet Milk, and Kroger.

[2] Includes Arden-Mayfair, Bowman Dairy, Dean Foods, Hawthorn-Mellody, Southland Corporation, Lawson Milk, H. P. Hood & Sons, and Cumberland Farms.

Source: Data prepared for the National Commission on Food Marketing by U.S. Department of Agriculture, Economic Research Service, Marketing Economics Division.

In 82 Federal milk order markets analyzed for the Commission by the U.S. Department of Agriculture, 9 national companies, although comprising less than 1 percent of the total number of companies, operated 10 percent of the total plants and accounted for 32 percent of total sales (table 5–4). They also accounted for 46 percent of the aggregate sales of the 4 largest regulated processors in the 82 markets. The eight regional firms operated less than 3 percent of the plants, accounted for 10 percent of total sales, and made 13 percent of the sales of the four largest processors.

In contrast, local single unit proprietary firms represented more than 90 percent of the total companies in the 82 markets and operated over three-fourths of the total plants, but they accounted for less than half of total sales. Cooperatives operated relatively few plants and accounted for only 8 percent of total sales.

Census of Manufactures data, although not current, indicate that multiplant and corporate firms have been increasing in importance (table 5–5). In 1958, multiplant firms operated 18 percent of the plants while accounting for 57 percent of the shipments. In 1954 they operated only 11 percent of the plants and likely accounted for a correspondingly lower proportion of shipments, although data on the latter are not available. Corporate firms

operated 43 percent of the plants in 1958 and made 80 percent of the shipments. The proportion of plants was higher than in 1954, and, in all likelihood, so was the share of shipments.

NUMBER AND SIZE OF PLANTS

The number of plants processing fluid milk products in the United States decreased by nearly two-thirds between 1948 and 1965, according to estimates prepared by the U.S. Department of Agriculture (table 5–6). In January of 1965, 5,597 plants were in operation compared with more than 19,000 plants during 1948.

TABLE 5–6.—*Number of fluid milk processing plants operated by processor-distributors and producer-dealers, 1948 and January 1965*

Type of operation	1948		January 1965		Change 1948 to 1965 (percent)
	Number	Percent	Number	Percent	
Processor-distributor	8,392	43	3,920	70	−53
Producer-dealer	11,319	57	1,677	30	−85
Total plants	19,711	100	5,597	100	−72

Source: Data prepared for National Commission on Food Marketing by the U.S. Department of Agriculture, Economic Research Service, Marketing Economics Division.

The decrease in number of plants operated by producer-dealers has been greater than for those operated by processor-distributors. Producer-dealers operated 1,677 plants in 1965 compared with 11,319 plants in 1948, a decrease of 85 percent. During the same period, the number of plants operated by processor-distributors decreased 53 percent.

Plant listings made by the Dairy and Food Industries Supply Association, which includes many but not all plants operated by producer-dealers, also indicate a sizable decrease in plant numbers, especially among small-sized plants (table 5–7). Plants processing less than 4,000 quarts per day decreased by nearly two-thirds between 1950 and 1962, while plants processing over 40,000 quarts per day increased by more than one-half.

The distribution of plants among size categories has been altered by changes in plant numbers. Plants processing under 4,000 quarts per day represented 68 percent of total plants in 1962, compared to 87 percent in 1950–51. On the other hand, plants producing more than 40,000 quarts a day represented 5 percent of the plants in 1961–62 compared to less than 2 percent 10 years previously.

Data on the fluid milk industry from the *Census of Manufactures* show the downward trend in plant numbers and the increase in volume or value of shipments per plant (table 5–8). Between 1958 and 1963, the numbers of fluid milk plants decreased by 21 percent while average value of shipments

TABLE 5–7.—*Changes in numbers of fluid milk processing plants by size groups, 1950–51 to 1961–62*

Size group [1]	1950–51		1961–62		Percentage change
	Number [2]	Percent	Number [2]	Percent	
Quarts per day (thousands):					
Under 4 [3]	13,988	87.0	4,906	68.4	−65
4–20	1,573	9.8	1,539	21.4	−2
20–40	295	1.8	365	5.1	+24
Over 40	233	1.4	366	5.1	+57
Total	16,089	100.0	7,176	100.0	−55

[1] Assuming 260 processing days per year or 5 per week.

[2] The plant numbers are estimates. They may be low or high depending upon the definition of "plant." The numbers presented here include the plants of many, but probably not all, producer-dealer type operations.

[3] Includes 8,535 plants in 1950–51 and 1,858 plants in 1961–62 for which no volume was listed. "The record indicates, however, that plants in this category consist principally of small plants whose volume is so small that the trade association which compiled the above data was unable to assertain their volume." See source below. Many of these would be the producer-dealer operations mentioned above in footnote 2.

Source: Federal Trade Commission, Order Adopting Findings and Conclusions and Deferring Entry of Final Order, in the matter of Beatrice Foods Corp., docket No. 6653, p. 22. (Basic data from listings of the Dairy and Food Industries Supply Association.)

TABLE 5–8.—*Number of plants by size groups of firms and average value of shipment per plant in fluid milk industry, 1954, 1958, and 1963*

Size group of firms	Number of plants—			Percent change	
	1954	1958	1963	1954 to 1958	1958 to 1963
1 to 4 largest	229	289	259	+26	−10
5 to 8 largest	67	84	77	+25	−8
9 to 20 largest	6,393	112	115	NA	+3
All others	.....	5,343	4,168	NA	−22
All firms	6,689	5,828	4,619	−16	−21
Shipments per plant [1] (thousands of dollars):					
All firms	654	909	1,238	+39	+36

[1] Based on value of shipments of fluid milk products by plants classified in the fluid milk industry.

Source: U.S. Bureau of the Census, special tabulations from the 1954, 1958, and 1963 *Census of Manufactures*.

TABLE 14–7.—*Net profits after taxes as percent of sales and stockholders' equity, for consolidated operations* [1] *of major companies processing and manufacturing dairy products, 1964 with 10-year range*

Firm	Percent of sales		Percent of stockholders' equity	
	1964	10-year range	1964	10-year range
National Dairy	3.3	2.8–3.3	11.8	10.6–13.9
Borden	3.5	2.6–3.5	10.6	10.2–11.1
Beatrice Foods	2.6	2.0–2.6	11.6	9.5–11.6
Carnation	3.4	2.4–3.4	11.6	10.0–11.6
Arden-Mayfair	1.0	0.4–1.0	12.3	3.2–12.3
Foremost	1.7	1.1–2.7	9.4	6.5–18.3
Pet Milk	2.2	1.4–2.2	8.5	5.8–8.5
Fairmont	2.4	1.1–3.2	9.3	4.6–11.0
Southland	1.3	1.3–2.3	18.5	11.6–21.2
Dean	2.0	1.1–2.5	(2)	(2)
Hawthorn-Mellody	2.9	2.0–3.8	16.0	11.2–19.4
Knudsen Creamery	4.6	(2)	14.3	(2)
14 firms reporting to First National City Bank, New York	3.0	2.5–3.0	12.2	10.5–12.4

[1] Includes nondairy and nonfood operations.
[2] Not available.

Source: Annual reports to stockholders; *Moody's Industrial Manual*, Securities and Exchange Commission, and Economics Department of the First National City Bank, New York.

their business. The results are summarized in table 14–8 along with roughly comparable data from other processors interviewed by the Commission staff and data from secondary sources.

In general, the percentage profit on sales was higher for the nondairy than for dairy operations of the major companies. Only 2 out of 11 companies estimated the profit on dairy to be as great as on nondairy. For 3 of 11 companies, nondairy operations netted over 4 percent on sales in 1964. This was higher than any reported return on dairy operations.

Fluid Milk Operations

Of eleven major companies submitting information to the Commission, all made 1 percent or more net profit on sales of fluid milk products (table 14–8). The most common level was 2 to 3 percent. In Denver where price wars had been occurring, 3 out of 11 proprietary firms, mostly small volume operations, reported losses. Some proprietary firms operating in Denver and Minneapolis reported profits greater than 2 percent, but the majority were below this figure.[10]

[10] Profitability of fluid milk operations depends heavily on plant and distribution efficiency, and type of outlets. These factors are discussed in chs. 10 and 13.

TABLE 14–8.— *Net profit after taxes as a percent of sales, dairy and nondairy operations, 1964*

Type of operations and number of companies	Negative	Net profit after taxes as a percent of sales				
		0 to 0.9	1 to 1.9	2 to 2.9	3 to 3.9	4 to 5.9
Consolidated operations (dairy and nondairy):						
12 Major companies [1]	.....	.....	3	5	3	1
14 Firms reporting to First City National Bank [2]	.....	.....	.....	.....	[6] 3.0	.....
Diary operations: 11 major companies	.....	.....	3	6	2	.....
Nondairy operations: 11 major companies	.....	1	1	4	2	3
Fluid milk operations:						
11 Major companies	.....	.....	4	5	1	1
11 Denver proprietary firms	3	1	2	4	1	.....
9 Minneapolis proprietary firms	1	3	3	2	.....	.....
70 Proprietary firms [3]	.....	.....	[6] 1.7	.....	.....	.....
27 New York City firms [4]	.....	[6] 0.7	.....	.....	.....	.....
Ice cream operations: 9 major companies [5]	1	2	1	1	2	2
Cheese operations: 5 major companies	.....	3	1	1	.....	.....
Powder operations: 5 major companies	.....	3	1	.....	1	.....
Butter operations: 6 major companies	.....	4	1	.....	.....	.....
Evaporated and condensed milk operations: 5 major companies	1	.....	.....	3	1	.....

[1] See table 14–7.
[2] Economics Department, First National City Bank (New York).
[3] U.S. Department of Agriculture, Economic Research Service, *Milk Distributor's Sales and Costs*, April–June 1964, MDSC No. 25 (Federal taxes assumed to be 45 percent).
[4] Survey for Metropolitan Dairy Institute prepared by Ernst & Ernst.
[5] Includes ice cream operations of Swift & Co.
[6] Average.

Source: Data submitted to the National Commission on Food Marketing if source not mentioned specifically above.

Statistics on profitability of fluid milk processing firms as compiled from records of the Internal Revenue Service are presented in table 14–9. Profitability fairly consistently increased as size of firm increased. In 1961, firms having under $50,000 total assets had negative profits in the aggregate while firms with assets of $250 million or more averaged 2.7 percent profit on sales and 9.1 percent on net worth.

Three companies reported profit information on creamers and whiteners. Profits after taxes ranged from 3 to 4 percent.

No information was obtained on profitability of some of the new dairy-based diet products, baby nursers, and other specialty products. In some cases, these products were still in the initial, high expense, market development stage.

TABLE 14–9.—*Profit after income taxes as a percent of business receipts and as a percent of net worth, fluid milk processing firms, by size groups, 1958–61*

Year	Total assets (thousands of dollars)										All firms
	Under 50	50 to 99	100 to 499	500 to 999	1,000 to 4,999	5,000 to 9,999	10,000 to 49,999	50,000 to 99,999	100,000 to 249,999	250,000 or more	
	Percent of receipts										
1958	−1.3	0.2	0.7	1.0	1.3	2.3	2.2	1.9	2.1	2.4	1.6
1959	−1.7	−.2	.7	.9	1.3	1.5	2.6	1.8	2.1	2.5	1.6
1960	−2.0	−.2	.7	1.4	1.0	1.3	1.8	1.7	2.0	2.6	1.5
1961	−.1	.5	.6	1.0	1.0	1.5	1.6	1.6	2.1	2.7	1.6
	Percent of net worth										
1958	−12.9	1.2	4.7	5.8	7.0	8.8	8.7	7.8	10.0	8.6	7.6
1959	−26.1	−1.4	4.1	6.4	6.9	7.0	7.4	7.4	9.3	9.1	7.5
1960	−55.2	−1.7	5.4	7.9	5.5	5.6	6.3	5.3	8.9	9.4	7.3
1961	−1.2	4.1	4.2	5.8	5.8	6.1	6.3	5.4	9.4	9.1	7.3

Source: Internal Revenue Service, *Source Book of Income.*

APPENDIX D.

UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE
WASHINGTON, D.C. 20250
Dairy Division

MAY 15 1968

Mr. Lynn C. Paulson
Executive Vice President
National Independent Dairies Association
1735 K Street, N. W.
Washington, D. C. 20006

Dear Mr. Paulson:

Our letter of March 4 informed you that there were 1,637 plants packaging fluid milk items for distribution in 74 Federal milk order markets during December 1967. These plants were owned by 1,554 handlers.

We have further analyzed the information in our files to eliminate the duplication of handlers who are owned by national and regional firms operating in more than one market. Based on our analysis, we estimate that the 1,637 packaging plants were owned by 1,412 firms.

Very truly yours,

Robert W. March

R. W. March
Acting Director

UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE
WASHINGTON, D.C. 20250
Dairy Division

MAY 20 1968

Mr. Lynn C. Paulson
Executive Vice President
National Independent Dairies Association
1735 K Street, N. W.
Washington, D. C. 20006

Dear Mr. Paulson:

In reply to your letter of May 16, our estimate of 1,412 firms that owned plants packaging fluid milk for distribution in Federal milk order markets did not include producer-handlers.

In December 1967, there were 417 producer-handlers distributing fluid milk items in 74 Federal milk marketing areas.

Very truly yours,

Robert W. March

Robert W. March
Assistant Director

APPENDIX E.

sources of MILK

FOR FEDERAL ORDER MARKETS BY STATE AND COUNTY

U.S. DEPARTMENT OF AGRICULTURE
Consumer and Marketing Service
Dairy Division

C&MS-50 (1968)

HIGHLIGHTS

During 1967, handlers subject to Federal milk marketing orders received milk from more than 140,000 producers in 46 States. The volume of milk from these producers accounted for more than 48 percent of all milk marketed and over 70 percent of the fluid milk of bottling quality sold to plants and dealers in the United States. Federal order plants were the recipients of all deliveries from producers in Arizona, Connecticut, New Jersey, and Rhode Island. In four States--Oregon, South Carolina, Alaska, and Hawaii--no producers delivered milk to handlers operating under Federal orders.

In December 1967, 22 markets received all of their producer milk from the State or States in which their marketing areas were located. In 26 other markets, it was more than 90 percent. In all but four markets, it was above 50 percent. The exceptions were the Connecticut, Massachusetts-Rhode Island-New Hampshire, Minneapolis-St. Paul, and Youngstown-Warren markets. The Massachusetts-Rhode Island-New Hampshire market received 73 percent of its supply from farms outside these States. Wisconsin producers accounted for 63 percent of the milk deliveries to the Minneapolis-St. Paul market.

In each of 13 markets, Federal order handlers received all of their producer milk from dairy farmers in one State. Fifteen markets had two States as their source of producer milk. The Delaware Valley and Southern Illinois markets, by comparison, obtained their milk supplies from producers located in eight States; the Eastern Colorado, Massachusetts-Rhode Island-New Hampshire, and New York-New Jersey markets received milk from seven States; and the Memphis, Nebraska-Western Iowa, and Rio Grande Valley markets were supplied milk by dairy farmers from six States.

Wisconsin producers delivered milk to 14 Federal order markets in December 1967. Producers in Oklahoma supplied 12 Federal markets and producers in Iowa, Ohio, and Texas shipped milk to 11 markets.

Producers in 1,971 of the 3,133 counties in 50 States delivered milk to Federal order handlers. Of the 1,971 counties, producers in 733 counties made deliveries to more than one Federal order market. Producers in 492 counties delivered milk to two markets. The number of counties with producer deliveries to three, four, and five markets were 143, 64, and 25, respectively. Auglaize and Mercer counties in Ohio; Adams, Jay, and Kosiusko counties in Indiana; and Dane, Green, Iowa, and Lafayette counties in Wisconsin each had producers supplying milk to six Federal order markets.

Every county in five States--Connecticut, Delaware, New Hampshire, Rhode Island, and Vermont--was represented by producers delivering milk to Federal order handlers. In 21 other States, producers supplying Federal order markets were located in at least 75 percent of the counties. In 9 States, the percentage of counties represented was at least 50 percent, but less than 75 percent. Only 11 States, including the four States with no producer deliveries to Federal order markets, had less than 33 percent of the counties represented.

APPENDIX F.

NEW KROGER DAIRY LARGEST IN U.S.

Michigan ice cream and milk plant serves 1½ million customers

fact sheet . . .

Size: 115,000 square feet
Milk—Daily capacity, 600,000 quarts
Sour Cream Processing—1200 gallons a day
Cottage Cheese—Daily capacity, 32,000 pounds
Ice Cream—Daily capacity, 50,000 gallons
Raw Milk Holding Tanks—25,000 gallons each; 100,000 total
Homogenizers: 12,800 gallons per hour
Pasteurizers: 13,800 gallons per hour; holding time 16 seconds @ 175 F.
Cream Separator: 11,000 R.P.M., 5,000 gallons capacity
Buttermilk Tanks: 6,000 gallons capacity
Pasteurized Milk Tanks: 35° F., capacity 5,800 gallons each
Pure-Pak Fillers: 60 gallons filled per minute or 75 quart, pint or half-pint or 275 half-gallon cartons
Bottling Area: 52,000 quarts per hour
Cottage Cheese and Sour Cream Filler: 120 cups per minute
Cottage Cheese Processing: Scientifically controlled atmosphere. Air is refrigerated, filtered and pressurized. Cooking and creaming vats hold 5,200 pounds
Milk Cooler: Temperature held at constant 35° F.; capacity, 22,000 cases
Ice Cream Batching Equipment: Weighs and blends ice cream ingredients via computer. Capacity 4,000 gallons per hour
Pasteurizer: Holding time 28 seconds @ 185° F.
Flavoring Vats: Total capacity 3,600 gallons
Continuous Freezers: Total capacity 4,800 gallons per hour
Fillers: 3600 packages per hour each, then overwrapped in bundles of four
Fruit Feeder: Feeds fruits and nuts into "soft frozen" ice cream
Hardening Tunnel: 40° below zero. Capacity 6,000 gallons per hour
Ice Cream Storage: 20° below zero. Capacity 300,000 gallons
Dairy serves estimated 1½-million customers in Michigan and Northern Ohio
It takes 20,000 cows a day to fill the pipelines.
Annual revenue to Michigan dairy farmers: More than $20 million ■

APPENDIX G.

Kroger Co. Dedicates Dairy in Hazelwood

Fri., Sept. 20, 1968 7C
ST. LOUIS POST-DISPATCH

By CURT MATTHEWS
Of the Post-Dispatch Staff

Since last May, 10,000 cows throughout Missouri and Illinois have been marching into milking barns twice a day to perform for the Kroger Co. The cows don't know it, but their output is needed to keep Kroger's new St. Louis dairy operating near capacity.

However, the farmers who own the cows have become very cognizant of the impact of Kroger's new 103,000 square foot installation at 6040 North Lindbergh boulevard in Hazelwood. Annual farm revenue generated by the milk requirements of the new dairy exceeds $13,000,000.

The dairy, scheduled to be dedicated today by Gov. Warren E. Hearnes, has a daily capacity of 500,000 quarts of milk, 1200 gallons of sour cream, 26,000 pounds of cottage cheese and 32,000 gallons of ice cream.

The dairy is the secpnd food processing operation for Kroger in the St. Louis area. The Cincinnati-based food company also has a bakery here at 1008 South Spring avenue. The St. Louis division headquarters and a major grocery distribution center is located adjacent to the dairy on North Lindbergh.

Distribution Economies

"The new dairy was put in the St. Lous area for the same reason Kroger located its distribution center here," says Gene D. Hoffman, a Kroger vice president with responsibility for manufacturing operations. "It is a matter of distribution economics. The Hazelwood area is the 'tonnage center point' for serving the 106 Kroger stores in the St. Louis division."

The "tonnage center point" is the point from which stores in the division can be served at the least cost.

"The economies of putting the dairy near the tonnage center point offset other factors, such as construction costs and proximity to dairy farming areas," Hoffman points out.

The Kroger dairy employs about 95 persons with an a total annual payroll of about $1,250,000. There are approxi-

Gene D. Hoffman

mately 2200 Kroger employes in the St. Louis Metropolitan area, counting those in stores, plants, warehouses and offices.

The St. Louis dairy is one of four milk processing plants operated by the Kroger Co. and the second new plant put in operation this year. The company also has expanded its food processing operations in recent years to pastries, candy, coffee, egg packaging, salad dressings, fruit preserves, nuts, olives, tea and liquid detergents.

More Convenience

Although Kroger executives are careful about tipping the company's hand to reveal the direction of further expansion, they do speak enthusiastically of the potential in the growing consumer preference for convenience foods.

Hoffman indicates that although Kroger has not introduced its own brand of precooked or portion controlled meals, research is being done in these areas.

Kroger's entry into new food lines could bring more development of its facilities here because of the advantages of distribution offered by locations in the St. Louis area.

"I would say that St. Louis could expect to see future Kroger expansion as long as it continues to offer efficiencies for the Kroger system," Hoffman saays.

Computer Control

The company terms the new dairy "a multi-million dollar" facility. It is considered one of the most advanced installations of its kind in the country and includes a number of production and quality control innovations not found in the other Kroger dairies.

Much of the product batching, line cleaning and process regulation is controlled by two computers in the St. Louis dairy. The plant is capable of producing 120 different dairy items and sizes, automatically switching from one product to another in many cases.

The Kroger Co., founded as a one store operation in 1883 by Barney H. Kroger in Cincinnati, has been engaged in the dairy business for 35 years. The company is the third largest food retailing firm in the United States with 1488 supermarkets in 23 states.

APPENDIX H.

Organization and Competition in FOOD RETAILING

Technical Study No. 7 • National Commission on Food Marketing • June 1966

supermarkets. The present pattern of competitive behavior is also a mixture.

Initially chain policy was simple price competition, but development of supermarkets by chains reduced the use of the "head-on price reduction." Most chains have modified their policy to put greater emphasis on pricing the mix to fit a local situation and lesser emphasis on straight price competition.

Some residual aspects of the original chain price competitive pattern still can be found, however. In many firms, the private label program is a continuing example of price competition involving many items.[9] For these private-label items, the competitive policy is still "buy for less, distribute cheaper, and discount at retail."

Aside from the general trend toward supermarket merchandising and away from straight-price competition, some major firms have continued to give very heavy emphasis to price. Also, some competitors—often smaller firms—have tried to develop a "food discounting" image.[10] While this "price competition" alternative is offered to consumers on a significant scale, it is not at all clear that consumers want straight-price competition. While there are some subgroups whose price sensitivity remains high, it appears that the main stream of consumers is increasingly sensitive to the nonprice offer of competing food retailers—the wide variety, carry-out service, convenient store hours, trading stamps, et cetera. To the extent that the minimum price alternative is available, both within a store and between types of stores, a market test of what consumers prefer is provided. Their receptivity to nonprice appeal suggests that higher gross margins can be expected in the future.

The Price Special

A price special is a temporary low price used to promote the store which is not justifiable in terms of the economics of cost or demand for the individual product.[11] Only 200 to 300 items out of a store's total offerings of several thousand are normally used in specials. Items with high turnover rates and high margins are selected. Out of 4,000 items in the grocery department, fewer than 150 usually meet these requirements.[12] The prices of these frequently purchased items are most often remembered by consumers.

---

[9] Private label is discussed in chapter 6. A detailed analysis is presented in *Special Studies in Food Marketing*, Technical Study No. 10, National Commission on Food Marketing, 1966.

[10] Food discounting, including free-standing discount supermarkets as well as those associated with discount department stores, now amount to over 14 percent of supermarket sales. See: "The True Look of the Super Market Industry," 1965, *Super Market Merchandising*, April 1966, p. 46.

[11] Loss leaders imply special prices below procurement cost. The economic meaning of retail prices at or below wholesale cost is very similar, however, because neither covers the cost of the retail function.

[12] "McKinsey-Lever Promotion Study," Lever Brothers Co., October 1965, p. 27.

Many meat items make attractive price specials. During a 14-week period studied by the Commission over two-thirds of the retail cuts of beef were specialed at one time or another.[13] No beef items were specialed in 3 of the 14 weeks. The price cuts ranged from 6.3 percent to 34 percent of regular retail price. On the average, price specials reduced the gross margin for beef by 6 percentage points or by about 26 percent. During the week of the most extensive price specialing, however, gross margins on beef were reduced 45 percent below gross margins obtained with no beef specials. Due to frequent specialing of meat products, the meat department in the supermarket may not cover its share of costs. The loss of revenue is viewed as a cost of promoting the store generally and is made up by other departments.[14]

The use of advertised price specials results in wide distribution of a great deal of price information. For this reason, price specials are viewed by many an evidence of aggressive price competition.

While price specials constitute price competition for the few people who shop by items, most shoppers buy a group of items. The supermarket is spending considerable time and ingenuity in pricing its mix of merchandise to appear competitive and remain profitable. For this reason, the advertised price specials do not give the housewife many clues concerning alternative offerings for her shopping list. Since she cannot determine at which store the price (for her list) is lower, it is hard to say that price is the primary focus of competition.[15] The price special and the supermarket merchandising efforts at pricing the mix are not examples of authentic price competition, and they do not assure the kind of performance that price competition is expected to encourage.

The price special, however, may be a very good promotion. When the retailer uses other promotions to get the customer's attention (stamps, towels, dishes, et cetera) the consumer must pay for these things she may not want in purchases of things she does want. Loss leaders transfer the benefits of a retailer's efforts to get the consumer's attention much more directly and efficiently to the consumer.

Retailers are selling necessities to consumers who are, for the most part, affluent. This affluence may mean that consumers may want and be able to pay for many luxuries and whims. Many promotions (trips to Hawaii, sport cars, et cetera) keyed to these real demands tend to increase the cost of doing business at retail. These higher costs apply to necessities—food—and must be paid for by the poor as well as the affluent. Price specials, as a promotion, have the advantage of making food available to the less affluent at low prices. While the typical housewife may pick a store and then buy her list there, the use of loss leaders as a promotional device makes it possible

---

[13] This example from one firm is chosen as being fairly representative. Data in considerably greater detail are given in *Organization and Competition in the Livestock and Meat Industry, Technical Study No. 1,* National Commission on Food Marketing, 1966.

[14] This subsidization of meat by other products would likely place at a disadvantage any effort of meatpackers to develop specialized meat retail outlets.

[15] In any given week, retailers tend to advertise different items than their competitors. This adds to the shopper's difficulty in making between-store comparisons.

for low-income families to shop item by item and get much of their food at low prices.[16]

An aspect of competitive behavior of general interest is the extent to which large firms may have an advantage over smaller firms. The trend toward nonprice competition in food manufacturing industries may suggest advantages to firms large enough to use national advertising effectively. Such "economies of scale in selling" seem to be much less important to retailing. National advertising media are unimportant to the retailer.

The retailing transaction is local. Local firms are able to use price specials and other promotion devices about as effectively as larger firms.[17] Large retailers often face a dilemma in trying to allow sufficient local autonomy to be "competitive" and yet retain enough central coordination to take advantage of possible efficiencies. Competitive injury to independent supermarket operators seems to be generally lessened by the tendency away from price competition and toward price specials and other promotions.

Price specialing by supermarkets, however, may result in competitive injury to retail operations specialized in a few lines. Retail home delivery of dairy products is an example. Consumers may value the convenience of home delivery enough to pay the difference between store costs and delivery costs. If fluid milk were specialed so intensely that the supermarkets' selling prices fell below cost, dairy delivery operation might be hurt significantly.

As long as food is sold at retail in large stores with many departments and thousands of items, prices of a few items will be used to convey impressions about price level in general, and pricing the "mix" will dominate merchandising behavior. Our way of life and our pattern of shopping suggests that we are not likely to move back to the small shop with a few staple food items. Price competition will continue to be replaced by promotion as the focus of retail competition. In this environment, price specials will continue to be important. While price specials are not evidence of straight-price competition, they are probably the least socially objectionable type of promotion.

---

[16] Unfortunately, low-income people are less often served by supermarkets than are better-off consumers. The availability and size of stores in low income communities discussed in ch. 17.

[17] Small local retailers are disadvantaged, particularly in a large city, by high cost of newspaper space. They have an advantage in being able to design promotions for a single community rather than a metropolitan area.

APPENDIX I.

[COMMITTEE PRINT]

89th Congress
2d Session } HOUSE OF REPRESENTATIVES

ECONOMIC REPORT ON MILK AND BREAD PRICES

A REPORT

BY THE

FEDERAL TRADE COMMISSION

NOVEMBER 1966

Printed for the use of the Committee on Government Operations

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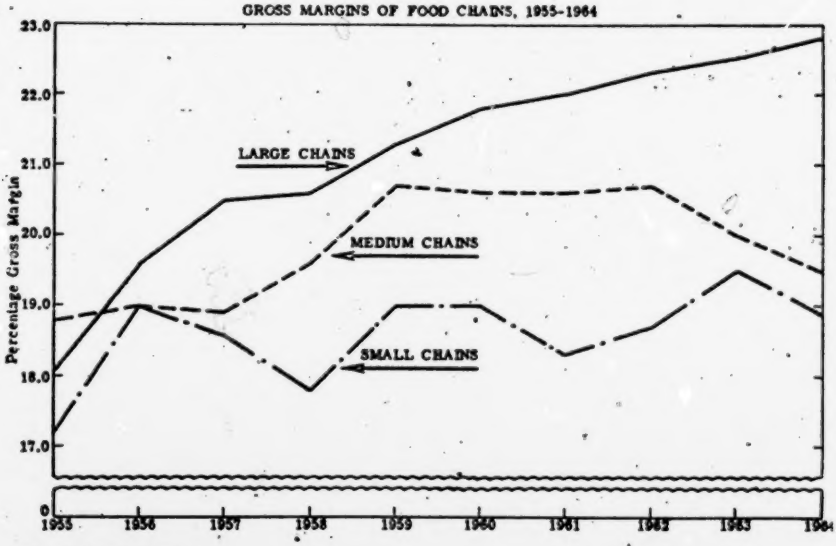
U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1966

70-873

Figure 4

GROSS MARGINS OF FOOD CHAINS, 1955-1964



Source: Appendix Table 4.

the January-August interval, the farmer's share held steady, the processor's share declined, and the retailer's share rose.

The increase in gross margins of food retailers has not been confined to bread and milk. (Gross profit margins are the difference between the cost of merchandise purchased by a retailer and the price at which the merchandise is sold.) Although gross margins of food retailers have risen continuously over the past decade, the greatest increases occurred among large food chains. Whereas in 1955 large food chains had gross profit margins of 18.1 percent, by 1964 their margins had grown to 22.8 percent (fig. 4). This is in sharp contrast to medium and small food chains, whose margins increased very little over the period.

Several factors contributed to increased gross margins. This matter was studied in depth by the National Commission on Food Marketing during the past 2 years. The final report of that body concluded as follows with respect to the causes of increased margins:

> Higher margins for retailers, in general, reflect the cost of trading stamps and other promotions, higher costs of renting or owning store facilities, increased labor costs and advances in other expenses. More services offered by retail stores add to the job to be done and account for some of the increase in costs.[2]

The Food Commission found that increased advertising and promotion (including trading stamps) alone accounted for 40.9 percent of the increase in margins of food chains between 1955 and 1964.[3]

The Food Commission further found that higher promotional expenditures had become reflected in higher retail prices. On this point the Food Commission concluded:

> When stamps were first introduced, retailers giving them frequently attained sufficient additional volume to more than pay for the stamps. Consumers, therefore, did not have to pay higher prices for food but benefited from the stamps

[2] "Food From Farmer to Consumer," Report of the National Commission on Food Marketing, 1966, p. 78.
[3] Ibid, p. 78.

and the premiums they obtained for stamps. As more and more of the industry adopted stamps and competing forms of promotion, however, it was no longer possible for retailers as a whole to obtain additional volume by using trading stamp promotion. As a result, the cost of the stamps represented an additional cost of retailing, and prices rose. All too often consumers buying food also were required, in effect, to make tie-in purchases of premiums being offered for trading stamps.[4]

Increased promotional costs pushed costs and prices of chains above those of smaller retailers. On the basis of in-depth studies of costs and prices in Portland, Maine, and Topeka, Kans., the Food Commission concluded:

> In the two markets, small local chains and affiliated independents had lower retail prices, lower margins, and lower operating expenses than large chains. Only in procurement costs did the larger chains have an advantage.[5]

Increased gross profit margins of chains have an important impact on the size of consumer expenditures in food stores. An increase of even 1 percentage point in the gross margins of food retailers involves $600 million. Hence, if all food retailers had increased their margins by as much since 1955 as did the largest chains—about 5 percentage points—it would have involved $3 billion.[6] This $3 billion would have been paid for by consumers in higher prices or by food store suppliers in lower prices, or would have been shared by the two groups.

Profit Trends

The trend in profit performance for the period 1948 to 1965 of the three branches of the food business with which we are concerned in this study is shown in table 1. The data on profits after taxes as a percent of net worth are given for bakeries, dairies, and leading food manufacturers. The table also contains separate profit data for the four largest and other large companies in the bakery and dairy industries.

There has been a steady downward trend in bakery profits over the past decade, with the drop most pronounced for the "other large" group. The top four earned 21.2 percent after taxes on net worth in 1948, averaged between 11 and 14 percent in the 1950's but by 1965 fell to 7.5 percent. The other large bakeries did worse, declining to below 10 percent return in every year since 1950 and consistently below 5 percent in the 1960's. Actual losses were registered in the 3 years 1962–64 and only a 2-percent return was secured in 1965.

Large dairies, particularly the big four, have fared better over the years than the bakeries. The four largest dairies in 1965 earned 12.4 percent after taxes on net worth, a rate of return exceeded only once since 1950. Because the overall profits of large dairies are influenced heavily by their nondairy operations, they probably overstate the rate of return earned on the fluid milk portion of their business.[7] The other large dairies earned 9.4 percent in 1965—about the average for the 1960's, but below the 11-percent rate earned in the late 1950's.

Leading food chains in 1965 earned 12.1 percent after taxes, which happened to be the same profit rate for leading food manufacturers.[8]

---

[4] Ibid., p. 77.
[5] Ibid., p. 79.
[6] In 1965 total food store sales came to $67 billion.
[7] Preliminary findings of our in-depth studies show that even leading dairies are earning very low rates of return on their fluid milk operations in some cities.
[8] The cutoff point in the definition of leading food chains is annual sales exceeding $100 million; for food manufacturers, $100 million or more of assets.

APPENDIX J.

GRAY L. DORSEY
8 CONWAY SPRINGS DRIVE
CHESTERFIELD, MO. 63017 U.S.A.

AREA CODE 314 469-3362
(ST. LOUIS) 863-0100

AFFIDAVIT

State of Missouri)
County of St. Louis) ss.

I, Gray L. Dorsey, attorney at law, swear that on January 10, 1969, at 12:05 p.m., 12:50 p.m., and 1:03 p.m., respectively, I personally observed the prices at which milk was offered for sale in the dairy cases of the following KROGER stores in the greater St. Louis metropolitan area:

4600 block of Chippewa, St. Louis, Missouri,
Westroads Shopping Center, Richmond Heights, Missouri,
8100 block of Maryland, Clayton, Missouri,

and that in all three stores the following products were offered at the prices indicated:

KROGER milk, Kroger Company,
one-half gallon, homogenized . . . . . 48¢

SEALTEST milk, National Dairy
Products, a national independent
dairy, one-half gallon, homogenized . . . . . 55¢

GOLDEN GUERNSEY, Valley Farm
Dairy, a local independent dairy,
one-half gallon, homogenized . . . . . 58¢

Gray L. Dorsey
Gray L. Dorsey

Subscribed and sworn to before me, this 10th day of January, 1969.

Leonard J. Skelton

My commission expires the _____ day of _____ 19___.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 986

HILAND DAIRY, INC., REISS DAIRY, INC., and SUNNY HILL FARMS DAIRY COMPANY, INC., *Petitioners*

v.

THE KROGER CO., *Respondent*

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

THE OPINIONS BELOW

The trial Court's Memorandum Opinion and Order appear at pages A. 1-7 of Petitioners' Appendix. The Opinion is reported at 274 F.Supp. 966. The Opinion of the Court of Appeals for the Eighth Circuit is included at pages A. 8-22 of Petitioners' Appendix. It is reported at 402 F.2d 968.

QUESTION PRESENTED

Whether a claim of attempted monopoly, prohibited by § 2 of the Sherman Act, is stated by a complaint to enjoin a retail grocer from entering the milk processing business by the internal construction of a dairy plant, to supply its own stores and other outlets, when the face of the complaint admits the following facts, among others:

(a) that the Respondent's retail grocery stores sell 8 per cent of the dairy products distributed at retail in the relevant market area defined in the complaint;

(b) that the dairy plant's total capacity approximates 20 per cent of present total demand in that area;

(c) that at least 70 dairies, including all of the largest national concerns, presently compete within the area; and

(d) that upon completion of the dairy plant, the Respondent will lack a sufficient market share to invest it with monopoly power to raise prices.

STATEMENT

A. The Nature and Chronology of the Case

Petitioners filed their complaint February 23, 1967, on their own behalf and on behalf of an alleged class including numerous dairies doing business in the "St. Louis, Missouri, Trade Territory", defined as "the geographical area within 250 miles, more or less, from St. Louis, Missouri" (R. 2)[1]—hereafter "the St. Louis

[1] The Record will be cited as "R."; the Petition as "Pet."; and the Appendix to the Petition as "A.".

Territory". The complaint alleged that because the Respondent—hereafter "Kroger"—operated retail grocery stores in that Territory, its internal expansion into dairy processing, by means of its own plant, was an unlawful attempt to monopolize trade in dairy products within the meaning of Section 2 of the Sherman Act. 15 U.S.C. § 2. No other violation of law was alleged. (R. 1-10).

On March 20, 1967, Kroger moved to dismiss the complaint for failure to state a claim on which relief could be granted. (R. 10-13). On September 11, 1967, the trial Court dismissed the complaint, noting Petitioners' failure to amend it or to request leave to do so. (R. 20-21). The Court of Appeals affirmed on October 31, 1968. (A. 22).

The complaint prayed only for a permanent injunction. (R. 8). No temporary restraining order or preliminary injunction was sought and the plant was completed before the case was heard in the Court of Appeals. (A. 14, n.4).

B. The Allegations of the Complaint

The material facts alleged in the complaint—admitted, *arguendo,* solely for purposes of the Motion to Dismiss—are as follows:

1. Petitioners are three dairies engaged in the processing and sale of fluid milk and other dairy products in the St. Louis Territory. (R. 1-2).

2. In addition to Petitioners, at least 67 other dairies are engaged in processing and selling fluid milk and other dairy products in the St. Louis Territory. Among them are National Dairy Products Corp., The Borden Co., Foremost Dairies and Beatrice Foods. (R. 1-2, 8-10).

3. Kroger is a retail grocery chain presently operating "more than 200 retail stores" in the St. Louis Territory. From these stores Kroger sells approximately 8 per cent of the fluid milk and other dairy products sold through retail outlets in the St. Louis Territory. (R. 2-4).

4. Although "existing processors have the capacity to and are effectively serving the needs of the territory" presently and "in the foreseeable future," Kroger has begun construction of a dairy processing plant. Upon completion it will have "sufficient capacity to supply more than 20 per cent of the total consumer demand for fluid milk and other dairy products in the" St. Louis Territory. Kroger undertook to build the plant with "the specific intent of supplying the full needs of all of [its] retail stores in the Territory" and of selling "dairy products to others at wholesale" in the Territory. (R. 4-5).

5. If completed, the plant will free Kroger from price restraints inherent in the purchase of dairy products from other processors "and from legislative limitations based upon resale markups or wholesale purchase prices." (R. 5).

6. Because it is engaged in the retail grocery business, Kroger will achieve "monopoly power" over dairy products, despite its inability "to increase its share of the milk and dairy products market to such a large percentage that it could then raise the prices of these products and subsequently reap a monopolist's benefit from the sales of these products at controlled high prices." (R. 5-6).

C. The Decisions Below

1. The Trial Court

The District Court's opinion summarized the market allegations of the complaint as follows (R. 15; 274 F. Supp. at 967):

> ". . . Kroger, with 200 retail stores, is presently constructing a facility by means of which it hopes to supply 20 per cent of the total demand for dairy products in this area including that satisfied in its own stores. Through its own retail outlets, Kroger is allegedly 'assured' of selling 8 per cent of the market and thereby of using 40 per cent of the plant's maximum production capacity. However, it will be compelled to compete with other processors, including the giants of the industry, for another 12 per cent of the market. The remaining 80 per cent of the market will not be affected, except indirectly."

The legal issue before the District Court was stated this way (R. 17; 274 F. Supp. at 968):

> "The basic question posed by the motion to dismiss is whether Section 2 of the Sherman Antitrust Act prohibits a large food retailer from continued internal expansion by constructing a plant in order to process one of the food products it sells (and for which it has a 'captive' market of 8 per cent), the plant having a capacity, in excess of the retailer's present needs, of an additional 12 per cent of the total market."

In dismissing the complaint, the Court held (R. 18, 19; 274 F. Supp. at 968, 969):

> "What plaintiffs are really saying, is that Section 2 of the Sherman Antitrust Act prohibits any large food retailer from manufacturing and processing any kind of merchandise it sells in quantity, at least if it intends to displace other processors which

have theretofore supplied its need for such merchandise. We have been cited to no comparable case which has ever so held or which has condemned internal expansion by a food retailer to provide for its own requirements.

* * *

"We hold that the mere construction of the processing plant by Kroger will not constitute a violation of Section 2 of the Sherman Antitrust Act."

2. The Court of Appeals

The Court of Appeals upheld the dismissal of the complaint as follows (A. 15, 18, 19, 22; 402 F.2d at 973, 975, 977):

"Accepting plaintiffs' premise that the Sherman Act prohibits any kind of act or practice that unduly restrains trade or monopolizes, we do not think any case has gone as far as the plaintiffs seek to journey in this one of protecting their market shares from competition of an internal expansion of Kroger into the St. Louis, Mo., Trade Territory; nor do we think the well-pleaded facts allege an attempt to monopolize in violation of § 2 of the Sherman Act.

* * *

"... Admittedly Kroger will not possess the power to raise milk prices. The power to lower milk prices by using milk as a 'loss leader' and recouping by higher prices on other items will not bear analysis as Kroger concededly has no monopoly in the retail grocery field. Its ability to raise prices above the market on other items appears speculative and is not warranted in view of the general competition in the market place. Also in the wholesale market for milk and dairy products its position is inferior to the combined shares of 67 other processors (including some of the giants of the industry, such as National Dairy

Products, Foremost, Borden), possessing ample capacity to supply the entire market. Plaintiffs admit in their brief that 'Kroger will be a newcomer in milk processing, have a relatively small share of the market, and will face competition from already established competitors, some of whom are national giants in the milk business'."

* * *

". . . A mere allegation of an attempt to monopolize is a conclusion of law and about all anyone could say is that Kroger would have the power potentially to engage in some unfair and predatory practices in this field, but there is no showing of unfair or predatory practices. And any future operations are subject to the proscription of federal and state laws that condemn monopolies and unfair and predatory trade practices that unduly restrict competition.

* * *

". . . Plaintiffs' market shares are not protected by the antitrust laws and they have no legal basis for precluding competition of Kroger in their field. This is all the District Court held and, of course, is the narrow holding of our affirmance upon appeal. Plaintiffs are not foreclosed by this decision in protecting themselves against any unfair trade practice or predatory acts that are unreasonably restrictive of competition in violation of the antitrust and other laws."

REASONS FOR DENYING THE WRIT

A. The Complaint on Its Face Seeks an Anti-Competitive Application of the Sherman Act

As the Court of Appeals readily perceived, the ultimate vice of Petitioners' complaint is the inherent attempt to preserve their existing market shares by using the antitrust laws as insulation against lawful competition. (A. 22; 402 F.2d at 977). The irony is com-

pounded by the target of the complaint—unilateral growth by the favored method of "internal expansion." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370 (1963).

The complaint perverts the principles underlying the antitrust laws in every significant aspect. First, it opposes the Congressional prerogative to regulate the national economy. Petitioners would have the Court override the legislative decision embodied in Section 7 of the Clayton Act. They demand an adjudication which

> "ignores the distinction made by Congress between market entry through internal expansion and that achieved through acquisition."[2]

The short answer is found in *United States* v. *Columbia Steel Company*, 334 U.S. 495, 526 (1948):

> "If businesses are to be forbidden from entering different stages of production that order must come from Congress, not the Courts."

Next, the complaint conflicts with the antitrust policy of encouraging competitive expansion of the national industrial structure. Petitioners invite the Court to frustrate the internal growth process by which industry can "provide increased investment in plants, more jobs and greater output." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 345 n. 72 (1962).

Third, the complaint defies the antitrust policy of insuring consumers the advantage of competitively determined prices. The Court is requested to underwrite

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[2] *United States Steel Corp.*, 3 Trade Reg. Rep. ¶ 18,626 at p. 20,985 (F.T.C. 1968).

higher milk prices, at the public's expense, by excluding a more efficient distributor from the marketplace. The paradox of such a plea, in the name of antitrust enforcement, is exposed by the Federal Trade Commission's § 7 decision in *Dean Foods Co.*, [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,765 (F.T.C. 1966).

In that case, Dean had acquired Bowman Dairy to offset a loss of business threatened by the internal expansion of a major chain store customer—Jewel Tea Co.— into dairy processing. The Commission rejected, as follows, an attempted justification of the merger grounded on its defensive character (*id.* at pp. 23, 102-03):

> "Respondent and the hearing examiner seem to us to have confused the effects of competition with competitive vitality and *to be suggesting that Section 7 was designed to protect market shares from the effects of competition* . . . . But as has been reiterated so often, the antitrust laws are not designed to protect competitors, but only competition. *Brown Shoe Co.* v. *United States* 370 U.S. 294, 320 (1962).[3]
>
> * * *
>
> "[T]he Bowman acquisition represented a completely noncompetitive response to the competitive problem posed to [Dean] by Jewel's contemplation of furnishing its own milk supplies . . . *The main point here is that Dean turned the entry of Jewel which could have resulted in a downward pressure on prices in the Chicago market, into a price stabilization move by its acquisition of Bowman* . . . ."

[3] Emphasis supplied throughout unless otherwise indicated.

B. The Complaint on Its Face Repudiates an Actionable Claim of Attempted Monopoly Under the Antitrust Laws

The facts pleaded in the complaint repel an actionable claim of attempted monopoly under the governing principles delineated by this Court. The basic test is the presence of a "dangerous probability" that, if not checked, the challenged conduct will achieve monopoly. *E.g., Swift & Co.* v. *United States,* 196 U.S. 375, 396 (1905); *American Tobacco* v. *United States,* 328 U.S. 781, 785, 815 (1946); *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 153 (1951). This was reflected by the jury instructions quoted and approved in *American Tobacco, supra,* 328 U.S. at 785, 815:

> "'The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, *though falling short, nevertheless approach so close as to create a dangerous probability of it,* . . . .
>
> "'It is in no respect a violation of the law that a number of individuals or corporations, each acting for himself or itself, may own or control a large part, or even all of a particular commodity, or all the business of a particular commodity.'
>
> * * *
>
> "Accordingly, the instructions of the trial court under § 2 of the Act are approved."

By this Court's definition, the hallmark of monopoly is "that power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco, supra,* at 811; *United States* v. *duPont & Co.,* 351 U.S. 377, 391 (1956); *United States* v. *Grinnell Corp.,* 384 U.S. 563, 571 (1966). As the Court of Ap-

peals noted, the applicable precedents disclose that a finding of monopoly presupposes proof of an overwhelming market share. (A. 16-17; 402 F.2d at 974),[4]

Under these standards, the complaint negates any actionable claim of attempted monopoly. The complaint alleges that Kroger will face numerous dairy competitors, including the largest national concerns (R. 2, 8-10; A. 18); can potentially supply 20% of the market (R. 4; Pet. 15); and cannot

> "increase its share of the milk and dairy products market to such a large percentage that it could then raise the prices of these products and subsequently reap a monopolist's benefit from the sales of these products at controlled high prices." (R. 6).

In view of these admissions, the professions of Kroger's wrongful intent are immaterial. An unlawful attempt to monopolize contemplates a showing that both "intent and the consequent dangerous probability exist." *Swift & Co.* v. *United States, supra,* 196 U.S. at 396. *Accord*: *Lorain Journal Co.* v. *United States, supra,* 342 U.S. at 153. Since Kroger admittedly will lack sufficient market participation to enable it to raise prices, the complaint belies any possibility—let alone "dangerous probability"—of monopolization. It fol-

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[4] In summing up the authorities on this issue, former Assistant Attorney General Turner, head of the Antitrust Division, testified before a Congressional Committee:

> "Also, Section 2 refers to monopolies but not to oligopolies, and it has never been found to cover a monopoly in an industry in which the leading firm accounts for less than 70 per cent of the market." *Hearings, Select Committee on Small Business, United States Senate, Status and Future of Small Business,* 90th Cong., 1st Sess. 714 (1967).

lows that the complaint is not saved by the assertions of wrongful intent, even assuming, *arguendo,* that this is properly alleged by subjective predictions of Kroger's future conduct.[5] Petitioners' difficulty is that on the facts pleaded, "whatever there was of wrongful intent could not be executed." *United States* v. *United States Steel Corp.,* 251 U.S. 417, 452 (1920).

The complaint is also belied by the supplemental material first introduced in this Court as appendices to the Petition. This rebuts the allegation that Kroger would preempt the milk and dairy products market represented by its stores. The complaint predicted that Kroger

> "intends . . . to supply the full needs of its retail stores . . . from which 8% of the milk and other dairy products are sold at retail in the St. Louis Trade Territory." (R. 5).

But, according to Petitioners' supplemental affidavit of January 10, 1969, Kroger's Missouri stores are also selling milk produced by a "national independent dairy" and "a local independent dairy". (A. 49).

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[5] As both lower Courts correctly held, the "intent necessary to support an attempted monopolization under § 2 must be shown by conduct or acts from which a wrongful intent can be inferred." (A. 19, 402 F. 2d at 975; R. 19, 274 F. Supp. at 969). Petitioners' complaint is barren of such a showing. In the trial Court's words (R. 19; 274 F. Supp. at 969):

> "Here, the sole actions of Kroger, as set forth in the complaint, are (1) the operation in this trade area of 200 retail food stores, and (2) the construction of a dairy processing plant to supply its own needs (with an excess capacity with which it will compete for a portion of the remaining market)."

This betrays the emptiness of the charge of monopoly as to Kroger's own retail outlets.[6]

Nor can the Section 2 charge of attempted monopoly be sustained by the allegation that Kroger would use dairy products as "loss leaders". (R. 5). Even if this were true, below cost sales would not increase the 20% market share attainable by Kroger's dairy. But again, the allegation is questionable. Missouri legislation—regulating "Unfair Milk Sales Practices"—expressly prohibits sales of dairy products below cost "at retail", including sales at retail by "processors".[7] This undermines Petitioners' use of the belated affidavit to imply that Kroger was "loss leadering" by offering its private label milk at 48¢. (A. 49; Pet. 18).

Petitioners' price argument demonstrates that "loss leadering" is not their real concern. If it were, they

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[6] Although accepting the allegation for purposes of the Motion, the trial Court suspected that Kroger stores would sell outside milk (R. 18, n. 1):

> "We seriously question whether the 8% of the market represented by sales of fluid milk and dairy products to Kroger customers is truly a 'captive' one. In this day and age, in which ultimate consumers are brand-name conscious, it does not necessarily follow that all Kroger customers who (for example) purchase Sealtest brand milk or ice cream will accept similar Kroger brand products, even at a reduced price. The situation is wholly unlike that of a steel manufacturer attempting to gain control of steel fabricators, in which event the market for the steel to be fabricated would be a 'captive' one."

[7] *Missouri Rev. Stat.* (1959) §§ 416.410-416.560, specifically § 416.415. Below cost sales of milk products at retail are also prohibited in Tennessee and Kentucky. *Tenn. Code Annot.* (1955) §§ 52-329-52-334; *Kentucky Rev. Stat.* (1960) §§ 260.675-260.760.

would be seeking relief under precisely tailored local legislation, not an attempted monopoly claim. Petitioners' object, rather, is to entice a judicial application of the Sherman Act to subsidize their operations against more efficient competitors. Particularly in this age of persistent increases in the consumer price index, the Sherman Act should be used to guard consumers against price exploitation, not to expose them to it.

C. There Is No Conflict of Decisions

The complaint is addressed solely to Kroger's unilateral action in building its own facility to process dairy products which it will offer for sale in an intensely competitive market. There is no charge of conspiracy or concert with anyone else. There is no claim that Kroger will condition the sale of any dairy products upon the purchase of other merchandise.

Only one antitrust decision—in a totally different monopoly context—has ever criticized internal expansion. *United States* v. *Aluminum Company of America,* 148 F.2d 416 (2d Cir. 1945). It has no bearing here. The following recital in the *Aluminum Company* opinion discloses the difference:

> "Nothing compelled it to keep doubling and redoubling its capacity *before others entered the field.*" 148 F.2d at 431.

The trial Court here aptly noted the distinction. (A. 5; 274 F. Supp. at 968):

> "There, defendant, the giant of the industry, continually anticipated increased demand by doubling and redoubling its capacity, thereby successfully deterring others from entering the market. Here,

some 70 dairy processors now have 100 percent of the market."[8]

Nor is a conflict indicated by any of the other authorities cited in the Petition. Each involved "concert" —*i.e.*, conspiracies, mergers or tie-in agreements—not unilateral action. This is readily apparent from the three purported conflict cases quoted in the Petition (Pet. 10, 11, 13). The complaint in *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, 212, 213 (1959) charged a group boycott, described as "a wide combination consisting of manufacturers, distributors and a retailer." *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 3 (1958), dealt with bilateral tying agreements—known as "preferential routing clauses"—requiring shippers who had purchased or leased land from the defendant railroad to favor it with their traffic.[9] The issue in *United States* v. *New York Great A. & P. Tea Co.,* 173 F.2d 79, 81, 82 (7th Cir. 1949) involved a conspiracy among A & P, its subsidiaries

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[8] Petitioners' complaint acknowledges that "existing processors have the capacity to and are efficiently serving the needs of the territory and are capable of serving the needs of the territory in the foreseeable future." (R. 4-5).

[9] The Court further noted that a grocery retailer operating in a competitive market would lack the market power to restrain trade by a tying arrangement (356 U.S. at 6-7):

> "Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

and various individuals. In the Court's words (*id.* at 82):

> "The issue is whether there is substantial evidence to show a conspiracy by the defendants to restrain and monopolize trade in commerce in food and food products by controlling the terms and conditions upon which the defendants and their competitors might do business and by oppressing competitors through the abuse of the defendants' mass buying and selling power. . . ."

D. The Motion To Dismiss Was Properly Sustained

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes motions to dismiss complaints for "failure to state a claim on which relief can be granted." The rule does not exclude antitrust claims. See, *e.g.*, *Nelson Radio & Supply Co.* v. *Motorola,* 200 F.2d 911 (5th Cir. 1952), *cert. denied* 345 U.S. 925 (1953); *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167, 169-70 (8th Cir. 1959), *cert. denied* 361 U.S. 884 (1959). As the Court of Appeals recognized—quoting *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 288, 290 (1968)[10]—there is no rule of thumb foreclosing summary disposition of antitrust claims in appropriate cases. See also *Northern Pacific Railway Co.* v. *United States, supra,* 356 U.S. 1, 4; *International Salt Co.* v. *United States,* 332 U.S. 392, 393 (1947).[11]

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[10] A. 13-14.

[11] In *International Salt,* the summary judgment was entered without affidavits, on the basis of facts admitted by the pleadings and the motion papers. See *United States* v. *International Salt Co.,* 6 F.R.D. 302, 304, 308 (S.D.N.Y. 1946).

If Petitioners' complaint states no claim, further proceedings would be an exercise in futility. In *Bank of Arizona, supra,* 391 U.S. at 290, this Court refused to hold

> "that anyone who files an anti-trust complaint setting forth a valid cause of action [is] entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

The Petition would have the Court go further. It claims that despite Petitioners' failure to state "a valid cause of action", they are nevertheless "entitled to a full-dress trial". Acceptance of the claim would expose the courts to a deluge of litigation. A "full-dress trial" would be required of every complaint subjectively ascribing a monopolistic intent to a competitor's plan to expand its facilities.[12]

---

[12] Although the complaint challenged Kroger's right "to complete the construction of a processing plant" (R. 6), no interim relief was sought and the plant was in fact completed pending appeal to the Court below. (A. 14, n. 4). So far as construction of the plant was in issue, the case may therefore be moot. *Compare Mills* v. *Green,* 159 U.S. 651 (1895); *Fink* v. *Continental Foundry & Machine Company,* 240 F. 2d 369 (7th Cir. 1957), *cert. denied,* 354 U.S. 938 (1957); *Colpo* v. *Highway Truck Drivers and Helpers,* 305 F. 2d 362 (3rd Cir. 1962); *Brill* v. *General Industrial Enterprises,* 234 F. 2d 465 (3rd Cir. 1956).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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THE KROGER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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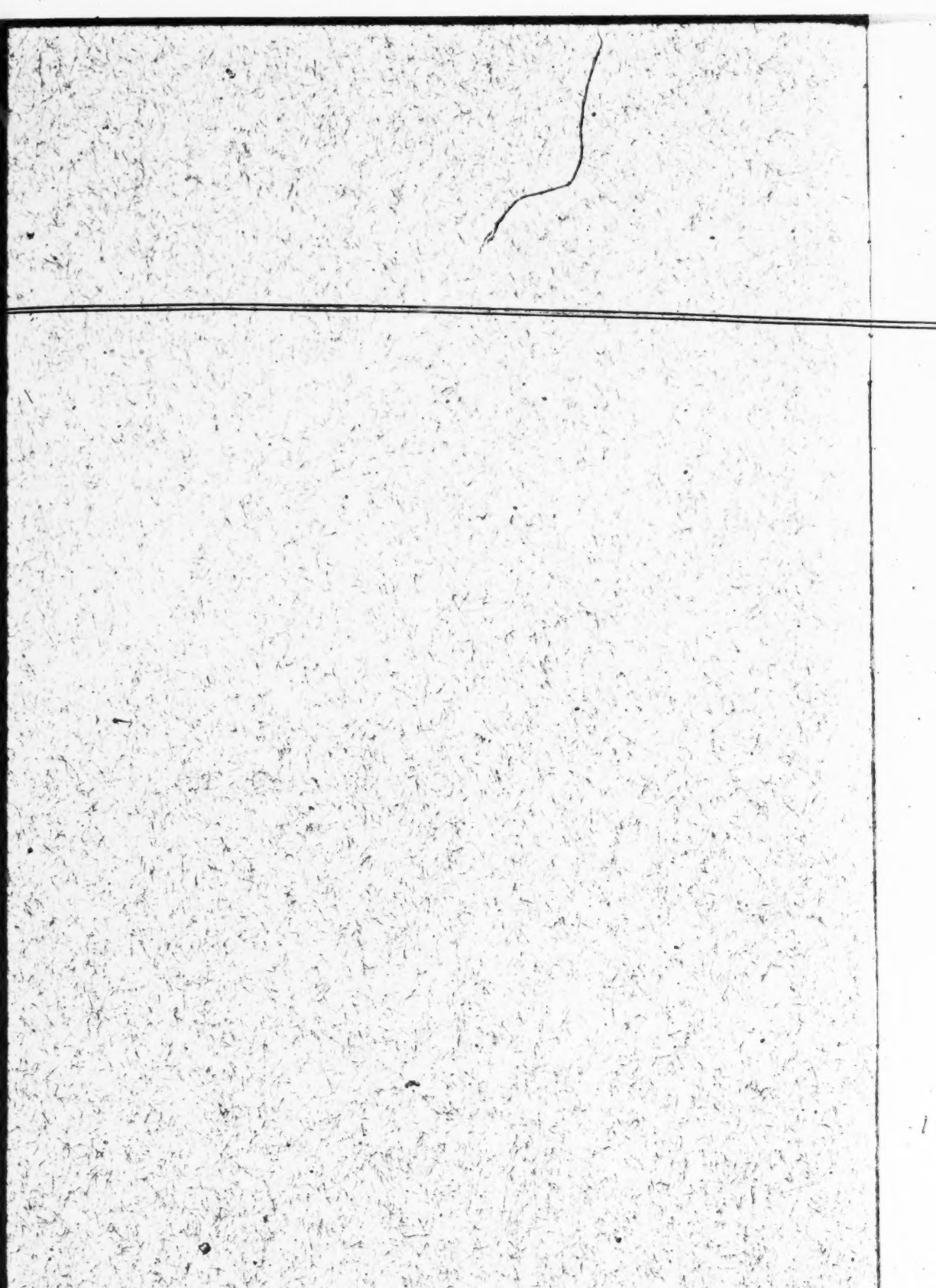

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PETITIONERS' SUPPLEMENTAL BRIEF.

Petitioners file this supplemental brief pursuant to Supreme Court Rule 24 (5), in order to call attention to a new case and to new matter not available at the time of last filing.

THE NEW CASE.

On April 7, 1969, this Court decided Fortner Enterprises, Inc. v. United States Steel Corp., ... U. S. ..., 89 S. Ct. 1252. Fortner sought treble damages from United States Steel for violation of Sections 1 and 2 of the Sherman Act for tying the sale of prefabricated houses

to loans made by United States Steel Homes Credit Corp. to Fortner.

In the Fortner opinion this Court reiterated the importance of private antitrust litigation "not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition," and strongly reaffirmed the rule of Poller v. Columbia Broadcasting, 368 U. S. 464 (1962) that summary proceedings in antitrust cases are disfavored. .... U. S. ..., 89 S. Ct. 1252, 1257-1259. One of petitioner's grounds for requesting the writ is that the court below failed to follow the Poller case. Petition pp. 14-15.

Most important of all, in Fortner this Court clearly holds that an allegation of dominant percentage type monopoly power is not necessary to state a claim under Sections 1 and 2 of the Sherman Act. This was Petitioner's principal argument. Petition, pp. 9-15. The Court below held that in the absence of an allegation of dominant percentage type monopoly power a claim can not be stated under Section 2 of the Sherman Act and dismissal is proper. Petition, pp. A-16–A-22. Fortner makes the error of this position clear beyond any shadow of doubt.

THE NEW MATERIAL.

In January 1969, when the petition was filed Kroger had established for Kroger milk a differential in the retail price for a half gallon of homogenized milk of 7¢ under Sealtest, a national independent dairy, and 10¢ under Valley Farm, a local independent dairy. Petition, p. A-49. This, in an industry where profits average less than 2 per cent of sales. Petition, p. 18.

The trial court refused to believe that Kroger had the market power to force brand-name milk off its shelves because of the hold that brand-name advertising has over

consumers. Petition, p. A-5. Respondent, in his brief in this Court, said that Petitioner's affidavit showing the above differentials in favor of Kroger milk proved the trial court correct and showed the "emptiness of the charge" that Kroger could monopolize even as to its own outlets. Rep. Br., p. 13. The affidavit in the Appendix shows that Kroger, in the interim, *has* monopolized the retail shelves in its stores for its own milk, keeping token amounts of only two other brands. In one Kroger store, Kroger has its own milk in 73 lines of cartons out of 84, leaving only 7 lines for Sealtest and 4 lines for Valley Farm. In another Kroger store Kroger has its own milk in 51 out of 60 lines of cartons; leaving 8 for Sealtest and 1 for Valley Farm.

Clearly Kroger is already exercising the destructive power that so gravely imperils independent dairies in the St. Louis area, national or local. Sealtest (National Dairy Products), and Valley Farm Dairy are named in the class for which Petitioner's brought the instant action.

New material also shows that Kroger's actions are forcing dairies selling to chain stores competing with Kroger to make price concessions that will prove ruinous. As the affidavit in the Appendix shows two local independent dairies, Pevely and Adams, are now selling their milk under private label to Bettendorf and National Food Stores respectively at prices that permit these stores, on a half gallon of homogenized, to sell their private label milk furnished by Pevely and Adams, at 9¢ less than the same milk on the same shelves under Pevely's and Adam's own brand names. Again, this is an industry where profits average less than 2 per cent of sales. Pevely and Adams are named in the class for which Petitioners brought this action.

Kroger has enough power to destroy all independent dairies in the St. Louis area, national and local, and is

using it for that purpose. Petitioners alleged that Kroger would acquire power of the nature and to the extent that the Affidavit in the Appendix to this Supplemental Brief shows it has in fact acquired. Petition, pp. 4-5; R. pp. 5-7. If that is not enough power to state a claim under the antitrust laws under the only section which can possibly afford these independent dairies protection against death by economic muscle, then the protection of the antitrust laws for independent businesses is puerile.

CONCLUSION.

The failure of the court below to follow the antitrust law as interpreted by this Court is now unequivocally clear, and the imminent danger to the independent dairies has greatly increased since the Petition for Certiorari was filed in January. The petition for a writ of certiorari should be granted and the decision below reversed per curiam so that trial on the merits can proceed immediately.

Respectfully submitted,

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Chesterfield, Missouri 63017,
Telephone 469-3362,
Attorney for Petitioners.

APPENDIX

CONCLUSION

APPENDIX

APPENDIX.

Gray L. Dorsey
8 Conway Springs Drive
Chesterfield, Mo. 63107 U. S. A.
Area Code 314 469-3362
(St. Louis) 863-0100

AFFIDAVIT.

State of Missouri, } ss.
County of St. Louis. }

I, Gray L. Dorsey, attorney at law, swear that on May 6, 1969, between the hours of 10:00 a. m. and 11:30 a. m., I personally observed the following facts in the Kroger Stores at Olive Blvd. and Midland Blvd., and in Westroads Shopping Center; in the Bettendorf Stores at Hanley and Clayton roads, and at 8041 Olive Blvd.; and in the National Food Stores at Olive Blvd. and Midland Blvd., and Big Bend and Ethel street, all in the St. Louis area:

(1) At the Olive-Midland Kroger Store there were 60 lines of cartons of milk in the dairy case (counting half gallon cartons 1 line, quarts ½ a line, and gallons 2 lines). Sealtest, a national independent dairy, had 8 lines; Valley Farm, a local independent dairy, had 1 line; Kroger milk, from its own processing plant, occupied 51 lines. For half gallons of homogenized milk prices were: Kroger, 48¢; Sealtest, 55¢; Valley Farm, 58¢.

At the Westroads Kroger Store there were 84 lines of cartons of milk. Sealtest had 7 lines; Valley Farm 4 lines; and Kroger milk occupied 73 lines. For half gallons of homogenized milk prices were: Kroger, 48¢; Sealtest, 55¢; Valley Farm, 58¢.

(2) At both Bettendorf Stores half gallons of homogenized milk of Pevely, a local independent dairy, were offered at 57¢. Side by side, half gallons of homogenized milk under the Bettendorf label were offered at 48¢. The code number printed at the top of the cartons of Bettendorf milk showed that it was processed by Pevely Dairy.

(3) At both National Food Stores half gallons of homogenized milk of Adams, a local independant dairy, were offered at 57¢. Side by side, half gallons of homogenized milk under the Top Taste label of National were offered at 48¢. The code number printed at the top of the cartons of Top Taste label milk showed that it was processed by Adams Dairy.

/s/ Gray L. Dorsey,
Gray L. Dorsey.

Subscribed and sworn to before me, this 6th day of May, 1969.

Erna Arndt,
Notary Public.

My commission expires the 1st day of September, 1972.

(Seal)

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 986

HILAND DAIRY, INC., ET AL., PETITIONERS

v.

THE KROGER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation of March 10, 1969, to the Solicitor General to express the views of the United States on this case.

STATEMENT

Petitioners, three dairy companies, filed this action under Section 2 of the Sherman Act seeking permanently to enjoin respondent, The Kroger Company ("Kroger"), from entering the milk processing business in a 250-mile radius around St. Louis, Missouri, and from unlawfully attempting to monopolize the sale of dairy products (R. 8). The district court dismissed the complaint for failure to state a claim upon

which relief can be granted (Pet. App. A–1), and the court of appeals affirmed (Pet. App. A–8).[1]

The complaint. The allegations of the complaint may be summarized as follows. The product market is the processing and sale at wholesale and retail of fluid milk and dairy products. The geographic market is the St. Louis, Missouri trade territory, defined as "the geographical area within 250 miles, more or less, from St. Louis, Missouri" (R. 2) (hereinafter "Territory"). Petitioners are Missouri dairies operating in these markets. They sued on behalf of themselves and as representatives of a class consisting of at least 67 similarly situated dairy companies located in the Territory, including National Dairy Company, The Borden Company, Foremost Dairies, and Beatrice Foods (R. 2, 8–10).

The defendant Kroger is a retail grocery chain; it manufactures, processes, distributes and sells at retail a broad line of merchandise, including fluid milk and other dairy products (R. 3). It operates about 1,500 retail grocery stores in 30 states, about 200 of which are in the Territory. Kroger sells approximately eight percent of the processed fluid milk and other dairy products sold in the Territory (R. 3).

For more than a year prior to the filing of the complaint, Kroger has been and is knowingly and deliberately attempting, with specific intent, to monopolize trade in fluid milk and dairy products.

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[1] The opinion of the district court is reported at 274 F. Supp. 966; the opinion of the court of appeals is reported at 402 F. 2d 968.

On or about February 15, 1967, Kroger began construction of a dairy processing plant in Hazelwood, St. Louis County, with capacity to supply more than 20 percent of the total consumer demand for fluid milk and other dairy products in the Territory (R. 4). Kroger intends not only to supply the full needs of its own stores in the Territory but also to sell dairy products at wholesale there (R. 4–5).

Kroger's operation of 200 stores in the Territory and its present eight percent of the retail dairy market give it power to reduce dairy prices, limited only by the willingness of processors to sell to it and regulatory limitations on pricing (R. 4). If the processing plant is completed, Kroger will be free from these limitations and will have power over prices and power to exclude competition (R. 5).

Kroger sells many product lines and, by means of increased volume and profit margins on other products, it can and does use dairy products as "leaders" and "loss leaders" to attract customers into its stores. The new plant will enable it to increase its use of dairy products for this purpose (R. 5). Kroger has the power to "reap the benefit of depressed milk and dairy products prices by means of increased volume and profit margins" on other grocery products sold to customers attracted by dairy loss leaders (R. 5–6). It can thus "immediately reap the benefit of its power to control the downward price of milk and other dairy products" and thus establish "monopoly power over these products * * * without the usual need to increase its share of * * * [the market] to such a

large percentage that it could then raise the prices of these products * * * " (R. 6).

Kroger "will have completed the acquisition of monopoly power over * * * milk and other dairy products in the * * * Territory if it is allowed to complete the construction" of its new processing plant (R. 6). Kroger's acquisition of such power, and attempt to acquire it by starting to construct the processing plant with specific intent to complete it and acquire monopoly power, violate Section 2 of the Sherman Act (R. 6).

It is further alleged that the violation will have numerous effects. Because it controls eight percent of the established market, its attempt to monopolize gives Kroger an unfair competitive advantage. This attempt also threatens to eliminate and destroy petitioners and other dairies, and seriously to weaken the survivors; will contribute to the concentration of the existing dairy industry and to the transfer of dairy processing to the food chain industry; will destroy local industry; will deprive the public of healthy competition and will compel the public ultimately to pay monopolistic prices for dairy products and other food items. (R. 7.)

The decisions below. The district court held that "the mere construction of the processing plant by Kroger will not constitute a violation of Section 2 * * *" (Pet. App. A–6). The court of appeals unanimously agreed. In its view, "[t]he gist of the complaint is that the building of the plant with the specific intent to monopolize constitutes a proscribed attempt to monopolize under Section 2" (Pet. App.

A–10). Although noting that a motion to dismiss and even a summary judgment proceeding "do not generally afford a satisfactory vehicle for disposing of complex issues" (Pet. App. A–13), it concluded that, stripped of conclusions, unreasonable inferences and unwarranted deductions of fact, the well-pleaded allegations of the complaint failed to state a claim (Pet. App. A–14 to A–15). It held that Kroger's acquisition, through internal expansion, of a 20 percent market share, even if successful, would not constitute a dangerous probability of monopolization (Pet. App. A–16 to A–18). It noted that there was no charge that Kroger could raise milk prices; Kroger's alleged power to lower them by using milk as a "loss leader" and to recover such losses from higher prices on other grocery products appeared to the court to be speculative, since Kroger concededly has no monopoly in the retail grocery field and must operate within the limitations of laws which prohibit predatory trade practices (Pet. App. A–16 to A–19).

Moreover, the court ruled that Kroger's specific intent to monopolize must be shown by conduct or acts from which such an intent can be inferred and that none is alleged. In the court's view the complaint charges, at most, that Kroger would have the power to engage in unfair or predatory practices which would be unlawful. It noted that growth by internal expansion is generally preferable to growth by acquisition, and observed that the only case condemning internal expansion[2] involved a market in which, un-

[2] *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (C.A. 2).

like the dairy industry, a firm with a 90 percent market share kept enlarging its capacity so as to foreclose competition. (Pet. App. A–19 to A–20.)

The court concluded that while there are cases in which market dominance or monopoly is not a prerequisite to establish a violation of Section 2, they all involve acts which, even if otherwise lawful, unreasonably restrain trade. It found that here, however, the only conduct challenged is the building of the dairy facilities, which is not itself unfair or predatory. The court found the claim that the plant would give Kroger a strategic advantage to be speculative and not warranted on the facts alleged (Pet. App. A–22).

ARGUMENT

1. Under the Federal Rules of Civil Procedure, a complaint cannot be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley* v. *Gibson,* 355 U.S. 41, 45–46. This principle applies no less to private antitrust litigation than to any other litigation. *Radovich* v. *National Football League,* 352 U.S. 445, 453. Indeed, this approach is essential to insure the effectiveness of private actions as a means of enforcing the antitrust laws (cf. *Perma Life Mufflers* v. *International Parts Corp.* 392 U.S. 134, 138–139). For, as the Court has noted, in complex antitrust ligitation, motive and intent are often crucial elements to showing a violation; such elements usually can be proved only in a full trial. *Poller* v. *Columbia Broadcasting*

System, 368 U.S. 464, 473; *Fortner Enterprises* v. *U.S. Steel,* No. 306, this Term, decided April 7, 1969.

Rule 8(a)(2) requires only that the complaint contain "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson, supra,* 355 U.S. at 47. Where, as here, the charge is attempt to monopolize—one element of which is a specific motive or intent (see points 2, 4, 5, *infra*)—the complaint need not set forth detailed facts to show such purpose.

2. In the court of appeals' view, the well-pleaded facts of the complaint could be summarized as showing (Pet. App. A–14 to A–15):

> [that] Kroger is a large national chain possessing great assets and presently controlling 8 per cent of the market in question, that it intends to (and did)* build a processing plant for milk and dairy products capable of supplying 20 per cent of that market which includes its captive market of 8 per cent, that it uses milk as a "loss leader", that existing processors have a capacity to and are effectively serving the needs of the territory, present and future, that the dairy facility will endow Kroger with the power to lower prices but not to raise prices, that it may attract

* While plaintiffs sought an injunction to enjoin Kroger from building the dairy facility they did not ask for a restraining order nor post a bond for a preliminary injunction. Now, that which they sought to enjoin having already been built, plaintiffs admit that their prayer should be changed to a request that Kroger be not allowed to attempt to monopolize the milk business. [Footnote by the court.]

> customers by the use of milk as a "loss leader" and sell to these customers other items at higher prices, and that plaintiffs would be adversely affected by the entry of Kroger in the wholesale dairy market.

Because it concluded that petitioners had failed to plead any acts or conduct which would show the requisite intent, the court omitted from this summary petitioners' allegation that Kroger was building its plant with the specific intent to acquire monopoly power in the market for dairy products in the Territory (Pet. App. A–18 to A–19). As noted above, however, petitioners' allegation (R. 6) of that specific intent must be deemed sufficient for purpose of the motion to dismiss.

3. We believe, first, that the facts alleged in the complaint do not tend to show that the construction of Kroger's plant will in itself give Kroger monopoly power in the sale of dairy products in the St. Louis area, and that its legal conclusions in this respect (R. 5) must, therefore, be disregarded. The complaint's factual allegations, relevant to this issue, are merely that Kroger is vertically integrating by building its own milk processing plant, that it controls eight percent of the retail shelf space from which milk and dairy products are sold, and that it has an intent in building its plant to achieve a position from which it can subsequently engage in conduct amounting to an attempt to monopolize.

Even if its plant operated at full capacity, Kroger could at most acquire a market share of no more than 20 per cent, and petitioners do not claim that this

share would give Kroger power to raise prices (R. 6); it would have "power" only to lower them.[3] Moreover, it seems clear from the allegations that the only portion of the market from which Kroger can exclude its competitors in the milk processing business is the eight per cent of the market which represents its own maximum requirements. As to the other 12 per cent which would make up the processing plant's capacity, Kroger's competitive position is similar to that of any other milk processor in the territory, and it is subject to the same regulatory limitations on pricing as other processors.[4] Indeed, Kroger would presumably be at a competitive disadvantage in trying to sell milk to its retail competitors. Thus, there are no facts alleged that support petitioners' conclusion that construction of the plant together with Kroger's control over eight per cent of the retail market for dairy products in the market will give it power over prices or power to exclude and control competition in dairy products (R. 5).

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[3] Power to lower, but not to raise, prices does not constitute control over price within the meaning of the monopolization cases. Obviously any seller has this power. While its exercise may in some circumstances, such as sales below cost, violate the law (*United States* v. *National Dairy Prod. Corp.*, 372 U.S. 29), its existence is not in itself evidence of monopoly power, which normally refers to the ability of sellers to raise prices at will. *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. at 811; *Fortner* v. *U.S. Steel*, *supra*, Slip Op. at p. 8.

[4] 21 Missouri Stat. (1968 Cumul. Pocket Part) 416.415 prohibits milk processors or distributors from selling any milk product, at wholesale or retail, below cost "with the intent or * * * effect of unfairly diverting trade from [or otherwise injuring] a competitor, * * * or of destroying competition, or of creating a monopoly * * *."

4. It follows that the complaint was properly dismissed if, as Kroger argues, a plaintiff, in order to establish an attempt to monopolize within the meaning of Section 2, must allege and prove a reasonable likelihood that the challenged conduct, if accomplished, would result in the monopolization of a relevant economic market (see *Swift and Company* v. *United States,* 196 U.S. 375, 402). We do not believe, however, that the "attempt to monopolize" provision of that Section is limited to a common-law "attempt" relationship with that Section's monopolization offense. Attempt to monopolize is a separate and distinct offense which should be defined in the light of Congress' purpose in the Sherman Act to reach all unreasonable restraints of trade (*Standard Oil Co.* v. *United States,* 221 U.S. 1, 61):

> the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.

Attempt to monopolize, therefore, is not limited to acts which, while falling short of monopolization, create a dangerous probability that it will be attained (*American Tobacco Co.* v. *United States,* 328 U.S. 781, 785, 815; *United States* v. *Aluminum Co., supra,* 148 F. 2d at 431). It also reaches acts by one competitor that exclude another from the market, when

the acts in themselves are so predatory, unfair, or clearly without legitimate business purpose as to be patently unreasonable restraints. *Lessig* v. *Tidewater Oil Company,* 327 F. 2d 459, 474–475 (C.A. 9), certiorari denied, 377 U.S. 993; see *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 222–226; *United States* v. *duPont & Co.,* 351 U.S. 377, 395–396, n. 23; *United States* v. *National City Lines,* 186 F. 2d 562 (C.A. 7), certiorari denied, 341 U.S. 916; Rahl, *Conspiracy and the Antitrust Laws,* 44 Nw. U. L. Rev. 743 (1950); Turner, *Antitrust Policy and the Cellophane Case,* 70 Harv. L. Rev. 281 (1956).[5] Accordingly, "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" *Lessig* v. *Tidewater Oil Company, supra,* at 474. It is "not in issue" because it is unnecessary to determine whether, if the attempt succeeded, monopolization would result; and the relevant market need be defined only to ascertain whether monopoly power itself exists.

We recognize that this Court expressed a seemingly contrary view of the "attempt to monopolize" provision in *Walker Process Equipment, Inc.* v. *Food Machinery Corp.,* 382 U.S. 172, 177–178. We do not believe the issue is foreclosed by that decision, however, since only monopolization, and not attempt to monopolize, was alleged in the complaint in that case, and neither in the briefs nor in the oral argument was there any effort to deal with the proper con-

[5] But see *United States* v. *Chas. Pfizer & Co.,* 245 F. Supp. 737 (E.D.N.Y.); *United States* v. *Johns-Manville Corp.,* 231 F. Supp. 690 (E.D. Pa.).

struction of the "attempt to monopolize" provision.[6]

5. It is, therefore, our view that the petitioners would be entitled to relief under Section 2 if they proved, in addition to the elements explicitly alleged in the complaint (see point 2, *supra*), that Kroger (1) specifically intends regularly to sell below cost the milk produced in its plant for the purpose of injuring other dairy processors, or to engage in other unreasonable exclusionary practices, and (2) has performed an overt act to implement that intention. Similarly, we believe it would be an unlawful attempt to monopolize if Kroger were to engage in such practices, or if it actually used its profits from the retail grocery business to subsidize persistent below-cost sales aimed at eliminating other dairy processors.

On the other hand, in the absence of proof of such exclusionary practices, or of an implemented specific intent to engage in them, we believe that this lawsuit would constitute merely an unmeritorious effort by the petitioners to exclude Kroger from legitimately competing with them. Internal vertical expansion by a firm that is not a monopolist is not in itself an unfair or predatory business practice. Rather, as the court of appeals recognized (Pet. App. A–20), entry by internal growth into new markets is the preferred method of industrial expansion under the economic policies expressed in the antitrust laws. Such expansion can

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[6] Similarly, we believe that this Court's explicit approval of the instructions to the jury in *American Tobacco Co.*, *supra*, 328 U.S. at 785, 815, must be read in light of the fact that the Court was there rejecting the petitioners' attack on the instructions and was not presented with any issue as to whether the instructions erred in favor of the petitioners.

enhance competitive performance and can result in reduced costs and lower prices to consumers.

The fact that Kroger may achieve economies through vertical expansion and may thereby be enabled to reduce milk prices does not, without more, evidence an attempt to monopolize. Nor is predatory intent shown by the fact that Kroger, by building a plant with capacity in excess of its current maximum retail requirements, is able to compete with petitioners in selling to other retail outlets. To hold otherwise might well inhibit firms from seeking to increase competition by entering new markets. Indeed, even if an unlawful attempt to monopolize were to be proved, by a requisite showing of specific intent, in a case such as the present one, we question whether it would be an appropriate remedy to enjoin the defendant unconditionally from entering the market.

6. Because the complaint alleges only a specific intent to attain a market position—which, as shown above, does not approach monopoly power—and does not allege any specific intent to engage in exclusionary conduct amounting to an attempt to monopolize, it is not clear to us that the petitioners are prepared to undertake the burden of proof we believe is necessary in order to substantiate their charge of an attempt to monopolize in violation of Section 2.[7] Although it may be too stringent under modern concepts of federal pleading to require more specific allegations in the complaint (cf. *Walker Process, supra,* 382 U.S. at 178), we believe that lawsuits seeking to stifle the

[7] We note also that petitioners have not sought to amend their complaint (R. 21).

entry of new competitors into a market should not lightly be encouraged. There is a danger that such suits can become the instrument of unwarranted exclusionary tactics by plaintiffs who wish to entrench their own competitive position. We submit, therefore, that certiorari should be denied in this case unless, in response to this memorandum, the petitioners indicate that they are willing to undertake the burden of proving the elements of a violation of Section 2 set forth in this memorandum (see point 5, *supra*).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied, unless the petitioners indicate to this Court that they are willing to undertake to prove an "attempt to monopolize" as defined in this memorandum, in which event the petition should be granted.

Respectfully submitted.

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MAY 1969.

SUPREME COURT, U. S.

FILED

MAY [illegible] 1959

[illegible], CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. [illegible]

HILAND DAIRY, INC., REES DAIRY, INC., and SUNNY HILL FARMS DAIRY COMPANY, INC., et al.,

Petitioners,

v.

THE KROGER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MEMORANDUM FOR PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 986.

HILAND DAIRY, INC., REISS DAIRY, INC., and SUNNY HILL FARMS DAIRY COMPANY, INC., et als.,
Petitioners,

v.

THE KROGER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MEMORANDUM FOR PETITIONERS.

This memorandum is filed in response to the Memorandum for the United States as Amicus Curiae, filed by invitation of the Court. In that Memorandum the Solicitor General concludes that certiorari should be granted if petitioners indicate to the Court that they are willing to undertake to prove an "attempt to monopolize" as defined therein.

Petitioners are willing to undertake the burden of proving the elements of a violation of Section 2 of the Sherman Act as set forth in the Solicitor General's Memorandum, specifically in Point 5.

Respectfully submitted,

GRAY L. DORSEY,
Attorney for Petitioners.

SUPREME COURT, U. S.

FILED

MAY 29 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 986

HILAND DAIRY, INC., ET AL., *Petitioners*

v.

THE KROGER CO., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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May 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 986

HILAND DAIRY, INC., ET AL., *Petitioners*

v.

THE KROGER CO., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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1. The United States Concedes That the Complaint Was Properly Dismissed Under Rule 12(b), But Proposes To Reinstate It by a Formula Which Subverts the Federal Rules of Civil Procedure and the Function of This Court.

On the very face of its Memorandum,[1] the United States concedes that the complaint was dismissible under Rule 12(b) of the Federal Rules of Civil Procedure for failure to state a claim entitling petitioners to

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[1] Hereafter cited "Mem."

relief.[2] The Government, however, advances the curious proposal that a defective complaint may be salvaged by a mere offer of proof submitted on petition for a writ of certiorari (Mem. 12, 14)—a formula which does not rise even to the dignity of the personal knowledge affidavit specified by Rule 56 for opposing motions for summary judgment. The United States accordingly compounds petitioners' misguided treatment of this Court as a trial forum. (See their Petition at A 23 *et seq.*, particularly A 36-37, A 49, and their Supplemental Brief.) Compare *Lawn* v. *United States*, 355 U.S. 339-54; *McClellan* v. *Carland*, 217 U.S. 268, 283.

In the process, the Government invites this Court to scrap Rule 12(b); to discipline the lower courts for observing the requirements of that Rule; and to penal-

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[2] To quote the United States (Mem. 12, 13):

> "It is, therefore, our view that the petitioners would be entitled to relief under Section 2 if they proved, *in addition to the elements explicitly alleged in the complaint* (see point 2, *supra*), that Kroger (1) specifically intends regularly to sell below cost the milk produced in its plant for the purpose of injuring other dairy processors, or to engage in other unreasonable exclusionary practices, and (2) has performed an overt act to implement that intention. (*Emphasis supplied here and throughout unless otherwise indicated.*)
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> * * *
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> ". . . the complaint alleges only a specific intent to attain a market position—which, as shown above, does not approach monopoly power—and does *not allege any specific intent to engage in exclusionary conduct amounting to an attempt to monopolize*, . . ."

The United States thus confesses that the complaint fails to satisfy the requirement of Rule 8(a)(2) that it "*shall* contain a short and plain statement of the claim showing that the pleader is entitled to relief."

ize respondent for properly relying upon it. Orderly procedure is subverted at every level of the federal judicial structure.

2. The United States Incorrectly States the Law on Attempts To Monopolize Within the Meaning of Section 2 of the Sherman Act.

(A) First, in attempting to escape the "dangerous probability" test (Mem. 10), the United States completely ignores this Court's decision in *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 153—cited in our Brief In Opposition at 10, 11. The Court there held:

> "To establish this violation of § 2 as charged, it was not necessary to show that success rewarded appellants' attempt to monopolize. The injunctive relief under § 4 sought to forestall that success. While appellants' attempt to monopolize did succeed insofar as it deprived WEOL of income, WEOL has not yet been eliminated. The injunction may save it. '[W]hen that intent [to monopolize] *and the consequent dangerous probability exist,* this statute [the Sherman Act], like many others and like the common law in some cases, *directs itself against that dangerous probability* as well as against the completed result.' Swift & Co. v. United States, 196 U.S. 375, 396. See also, American Tobacco Co. v. United States, 328 U.S. 781; United States v. Aluminum Co. of America, 148 F2d 416, 431."[3]

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[3] There is no merit in the attempted recourse to *Standard Oil Co.* v. *United States,* 221 U.S. 1, 61, to demean the significance of *Swift & Co.* v. *United States,* 196 U.S. 375, 402 as an outmoded invocation of the "common law 'attempt' " concept (Mem. 10). The *Standard Oil* case itself invokes the common law as the proper basis for interpreting Section 2 of the Sherman Act. 221 U.S. at 59.

(B) Second, the United States euphemizes this Court's explicit declaration in *Walker, Inc.* v. *Food Machinery,* 382 U.S. 172, 177, that the "relevant market" is necessarily in issue with reference to an alleged attempt to monopolize (Mem. 11-12). To quote *Walker* (*ibid*):

> "To establish monopolization or *attempt to monopolize* a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim *in terms of the relevant market for the product involved.* Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition."

(C) Third, the United States overstates the meaning of the Court of Appeals decision in *Lessig* v. *Tidewater Oil Company,* 327 F.2d 459, 474-75 (C.A. 9)—quite apart from the fact that the construction of Section 2 in that case is incompatible with this Court's decisions in *Lorain Journal* and *Walker, supra.* The *Lessig* case is invoked for the proposition that the "attempt" proscription of Section 2 is satisfied by a mere showing of "predatory" or "unfair"

> "acts by one competitor that exclude another from the market." (Mem. 10-11.)

The argument thereby not only mistakenly implies that *Lessig* excised the word "monopolize" from the statutory reference to prohibited attempts, but also misapplies that case to the acknowledged facts of this one.

Specifically, the Court in *Lessig* was careful to emphasize, as follows, the presence of evidence of classic

monopoly power in holding that there was a jury issue of attempted monopoly (327 F.2d at 474):

> "*The essence of monopoly is power to control prices and exclude competition,* and what we have said demonstrates that there was evidence that Tidewater possessed the specific intent to acquire and exercise such power with respect to a part of commerce."

And, in contrast to this recital in *Lessig,* the United States here confesses that petitioners' complaint is barren of any allegations warranting any such charge against Kroger. To use the Government's own words (Mem. 9):

> "Thus, there are no facts alleged that support petitioners' conclusion that construction of the plant together with Kroger's control over eight per cent of the retail market for dairy products in the market will give it power over prices or power to exclude and control competition in dairy products (R. 5)."

3. The United States Distorts the Sherman Act by Claiming That Section 2 Applies to Unilateral Acts of "One Competitor That Exclude Another From the Market."

It is elementary that the Sherman Act imposes more rigorous standards than the Clayton Act for establishing an offense. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 608-10; *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 335. As this Court has recognized, the Clayton Act is nevertheless addressed only to the "protection of *competition,* not *competitors.*"[4] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320.

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[4] Emphasis in original.

This case is brought solely under the Sherman Act. Accordingly, petitioners "must measure up to the criteria of the more stringent law." *Times-Picayune, supra,* 345 U.S. at 610. Yet, the United States would stretch Section 2 of the Sherman Act beyond the ambit of the Clayton Act—to protect not "competition," but every "competitor( )".[5]

The misapprehension underlying such an interpretation of the Sherman Act is easily demonstrated. When Congress has determined to inhibit the unilateral conduct of a single actor because of resulting injury to a lone competitor, it has known how to do so. This is evident from § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act—15 U.S.C. § 13(a)— and its application in *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115, 118.[6]

The misconception is equally apparent from § 3 of the Robinson-Patman Act which was applied in *United States* v. *National Dairy Corp.*, 372 U.S. 29. Section 3 is in terms addressed to the sale of

> "goods at unreasonably low prices for the purpose of destroying competition *or eliminating a competitor*". 15 U.S.C. § 13a.

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[5] We recognize, of course, that where the violation involves Section 1, 15 U.S.C. § 1, the presence of a forbidden "contract, combination . . . or conspiracy" may bring the Act into play at the behest of a single competitor. *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, 212-14.

This case, however, deals with the unilateral conduct of a single actor.

[6] We refer to the following language of Section 2(a) inhibiting price discrimination

> "where the effect . . . may be . . . to injure, destroy, or prevent competition with *any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.*"

Section 3 was thus squarely aimed at the precise conduct now said to have been covered all the while by the attempted monopoly prohibition of Section 2 of the Sherman Act. To quote the Court in *National Dairy, supra,* 372 U.S. at 34:

> "In proscribing sales at 'unreasonably low prices for the purpose of destroying competition or eliminating a competitor', we believe that Congress condemned sales below cost for such purpose."

Consequently, the import of the Government's memorandum is that the enactment of § 3 of the Robinson-Patman Act was a useless exercise. It claims that Section 2 of the Sherman Act, likewise a criminal statute,[7] already covered the identical subject—namely, predatory "acts by one competitor that exclude another from the market," including specifically "below-cost sales aimed at eliminating other dairy processors". (Mem. 10-11, 12.)[8]

4. The Government's Effort To Revive the Complaint Should Be Rejected as a Matter of Sound Judicial Administration.

Certiorari should be denied in this case, regardless of the propriety of the Government's unique procedural formula or the validity of its unprecedented analysis of Section 2. First, the facts here are conclusive that a trial of this complaint, on the Government's own theory, would simply saddle the District Court with a useless trial. Second, and more broadly—to paraphrase

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[7] 15 U.S.C. § 2.

[8] Section 3 reflects a Congressional mandate that criminal sanctions only were to be applied against the defined conduct. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373. The present position of the United States would nullify that decision.

the United States—a mandate for trial of the case would burden the federal judiciary with unworthy "lawsuits seeking to stifle the entry of new competitors into the market" (Mem. 13-14).

According to the Government's theory, petitioners could prevail only by proving that Kroger had overtly demonstrated its intent "regularly to sell below-cost" or "actually used its profits from the retail grocery business to subsidize persistent below-cost sales" for the purpose of "eliminating other dairy processors" (Mem. 12). The present record demonstrates the sheer fantasy of this concept.

As the Government expressly recognizes, the complaint admits that Kroger sells only 8 per cent of retail dairy products in the affected territory; that its dairy plant can supply a maximum of 20 per cent of consumer demand for such products; and that its dairy must compete with 70 other dairies now operating in the territory, including the national giants of the industry, who will retain 80 per cent of the market in any event (Mem. 2-3, 8-9). In such a setting, it defies reason to assume that Kroger would elect to pursue a course of conduct which would turn its new dairy—built at a high level of modern construction costs—into a white elephant and simultaneously drain the profits from its retail grocery business.

Plain common sense dictates that the already overworked federal trial courts ought to be spared the burden of full-scale litigation of such a fanciful case. And a flow of similar cases will inevitably follow, if this Court requires trial of the present one.

In sum, if this Court tolerates the notion that defective complaints may be rescued by offers of proof

at the certiorari stage, the net result would be to deny trial courts the protection against empty claims now provided by Rule 12(b). Nor will the federal appellate courts escape the consequences. Whenever 12(b) motions are granted, they will be confronted with the necessity of hearing appeals pursued on the premise that failure to state a claim below may be corrected by an offer of proof at the appellate level.

5. Conclusion

For the reasons stated in this Reply and in our Brief In Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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